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NOMINATIONS OF ROBERT B. SIMS AND ROBERT K. DAWSON

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HEARING

BEFORE THE

COMMITTEE ON ARMED SERVICES UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

NOMINATIONS OF

ROBERT B. SIMS TO BE ASSISTANT SECRETARY OF DEFENSE FOR PUBLIC AFFAIRS

ROBERT K. DAWSON TO BE ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS

SEPTEMBER 12, 1985

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NOMINATIONS OF ROBERT B. SIMS TO BE ASSISTANT SECRETARY OF DEFENSE FOR PUBLIC AFFAIRS AND ROBERT K. DAWSON, TO BE ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS

THURSDAY, SEPTEMBER 12, 1985

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, DC.

The committee met in open session at 9 a.m. in room SR-222, Russell Senate Office Building, Senator Barry Goldwater (chairman) presiding.

Present: Senators Goldwater, Thurmond, Warner, Humphrey, Denton, Gramm, Nunn, and Stennis.

Also present: Senators Stafford, Heflin, and Gore.

Staff present: James F. McGovern, staff director and chief counsel; Arnold L. Punaro, staff director for the minority; Alan R. Yuspeh, general counsel; Jeffrey H. Smith, minority counsel; Christine C. Dauth, chief clerk; Patrick A. Tucker, counsel; George K. Johnson, Jr., professional staff member; Marie Chaillet, staff assistant.

Also present: Gerald J. Smith, assistant to Senator Goldwater; Romie L. Brownlee, assistant to Senator Warner; Dale F. Gerry, assistant to Senator Cohen; Henry D. Sokolski, assistant to Senator Quayle; Mark J. Albrecht, assistant to Senator Wilson; Allan W. Cameron, assistant to Senator Denton; Alan Ptak, assistant to Senator Gramm; Jeffrey B. Subko, and Greg Pallas, assistants to Senator Exon.

OPENING STATEMENT BY SENATOR BARRY GOLDWATER, CHAIRMAN

Chairman GOLDWATER. The meeting will come to order.

The committee meets this morning to consider the nomination of Robert Sims to be Assistant Secretary of Defense for Public Affairs, and the nomination of Robert K. Dawson to be Assistant Secretary of the Army for Civil Works.

We will first consider Mr. Sims, but I would like to say that his wife, Patricia, is with us, their daughter Carolyn, and that is a wonderful name. I have a daughter Carolyn, and a granddaughter Carolyn, and two cousins Carolyn, and an aunt, so you are almost in. [Laughter.]

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Bob Sims has been at the White House serving as Special Assistant to the President and Deputy Press Secretary for Foreign Affairs since 1983. He had previously served on the staff of the National Security Council, and is a Navy public affairs specialist.

Specifically, Mr. Sims was Deputy Chief of Information for the Department of the Navy and Special Assistant for Public Affairs to the Secretary of the Navy. Was that you, John?

Senator WARNER. Yes, sir.

Chairman GOLDWATER. Mr. Sims has also worked as a daily newspaper reporter, which we will not hold against him, and as a weekly newspaper editor and publisher.

Mr. Sims did his undergraduate work at Union University and earned a master's degree in journalism and political science from the University of Wisconsin. He is a native of Tennessee, and Senator Sasser wanted to be here to introduce you, but he cannot make it this morning.

As is our practice, the committee staff has met with Mr. Sims to review his financial holdings, to insure that there will be no conflict of interest between those holdings and his Government responsibilities.

Mr. Sims, we extend our congratulations on this appointment. You will have a very important role to serve as the senior public affairs official for the Department of Defense.

[At the request of Senator Thurmond, Senator Gore's prepared statement follows.]

REMARKS OF HON. ALBERT GORE JR., A U.S. SENATOR FROM THE STATE OF TENNESSEE

It is a rare feat for someone to write a book about a job before he takes it. But those who have met Robert Sims know what an exceptionally thorough professional he is.

Since he left the Crockett Times of Alamo, TN, in 1958, Captain Sims has devoted more than 25 years to military and public service. He served with the Navy in Vietnam and at the Pentagon, and worked for the administration at the National Security Council and in the White House. He has made himself an expert in defense matters and public affairs.

Captain Sims is an unimpeachably fair man who knows the military beat. His recent book, "The Pentagon Reporters," gives an honest and balanced account of the relationship between the press and the Pentagon.

Through the years, Captain Sims has kept in touch with his journalistic roots back in Tennessee. Following in his father's footsteps, he continues to publish the weekly paper where he learned to write. I know that when he briefs reporters at the Pentagon, he will not forget that the questions he hears, like the decisions he explains, are made on behalf of the folks in Crockett County.

As a journalist and a veteran myself, I share Robert Sims's conviction that reporters and military leaders pursue the same goal—a strong, safe, and well-run America. We need men like him at the Pentagon.

Chairman GOLDWATER. The nomination reference and biographical sketch of Mr. Sims will be inserted in the record at this point.

[The nomination reference and biographical sketch of Mr. Sims follow:]

NOMINATION REFERENCE

AS IN EXECUTIVE SESSION,
SENATE OF THE UNITED STATES,
August 1, 1985.

Ordered, That the following nomination be referred to the Committee on Armed Services:

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Robert B. Sims, of Tennessee, to be an Assistant Secretary of Defense, vice Michael Ira Burch, resigned.

BIOGRAPHICAL SKETCH OF ROBERT B. SIMS

On August 1, 1985, the President announced his intention to nominate Robert B. Sims as Assistant Secretary of Defense for Public Affairs. Since October 1983, Mr. Sims had served at the White House as Special Assistant to the President and Deputy Press Secretary for Foreign Affairs.

Previously, he had been serving as Special Assistant to the President and Senior Director of Public Affairs on the National Security Council. He joined the NSC staff in May 1982.

A Navy public affairs specialist with the rank of Captain before he left active duty in 1984, Sims was a Senior Research Fellow at the National Defense University in 1981–1982. He served as Deputy Chief of Information for the Navy Department in 1978–1981 and was Special Assistant for Public Affairs to the Secretary of the Navy in 1974–1978.

Sims worked as a daily newspaper reporter in Tennessee, and as a weekly newspaper editor and publisher there. His writings include "The Pentagon Reporters," a book about journalists who cover the Department of Defense.

He has a Bachelor of Arts degree from Union University at Jackson, Tennessee, and Masters degrees in journalism and in political science from the University of Wisconsin at Madison, Wisconsin. He was a Rotary Foundation Fellow at the University of Sydney, Australia. He is a graduate of the National War College. He is a member of the National Public Affairs Advisory Council, Virginia Tech University.

Sims is married, has four children and resides in Washington, D.C. He was born November 26, 1934, in Alamo, Tennessee.

Chairman GOLDWATER. With all of that, you may proceed, Mr. Sims, any way you want to go.

STATEMENT OF ROBERT B. SIMS, ASSISTANT SECRETARY OF DEFENSE-DESIGNATE FOR PUBLIC AFFAIRS

Mr. SIMS. Mr. Chairman, I have no prepared statement. I am honored that the President has nominated me for this position. I would serve to the best of my abilities, and I would be pleased to answer any questions the committee may have.

Chairman GOLDWATER. Thank you. There is one question that we always ask. Do you agree to appear before this committee or any other committee of the Congress whenever you are asked to, and to fully and completely answer any questions posed by a congressional committee?

Mr. SIMS. Yes, sir, I would do that.

Chairman GOLDWATER. What do you see as the major shortcoming in the public information effort of the Defense Department?

Mr. SIMS. Well, I am not sure of the shortcomings. I recognize that we have a need for better public understanding of our national defense program, and I would endeavor to bring that about.

Chairman GOLDWATER. Do you feel the coverage is getting better for the military?

Mr. SIMS. Well, I think there is still very good coverage of the military people, the men and women who serve in the Armed Forces. I think they still have the feeling that this country appreciates what they are doing.

I am not as pleased with the coverage that we have received recently on other aspects of the Defense Program, and I would hope to do something to improve that.

Chairman GOLDWATER. Some people feel that the coverage of the press, on defense procurement issues such as spare parts, has been

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unbalanced, incomplete and sometimes inaccurate. Do you have a view of the fairness of reporting about procurement issues?

Mr. SIMS. Well, I have a general view that most reporters try to be fair but there are things that are exciting and interesting to the public, and when we have a horror story that is of interest at the moment, sometimes we do not see the other side of the story if there is a better side of that.

But, I do not have any criticism as to the fairness of the reporting. Our job is to communicate. If we do that well, we will not be reported unfairly.

Chairman GOLDWATER. Thank you very much. Senator Thurmond, do you have any questions?

Senator THURMOND. Now, I have already talked with him. I would just like to associate myself with your remarks, and add my welcome to Mr. Sims. It is a pleasure to have you here today, Mr. Sims. You have a distinguished record of service to our country, in the Navy as well as in the executive branch.

I note from your biography that you are an author and that you studied international relations in Australia. You are very well qualified for the job for which you have been nominated. I will be pleased to work with you in any way I can.

The past relationship between the press and the Department of Defense has been poor at times. I hope that an improved relationship with the media will be one of your goals in your new assignment. The press accounts that I have seen about you indicate that you are well respected by members of the press, which aids you significantly in your job.

I wish you good luck in your new one.

Mr. SIMS. Thank you, Senator Thurmond.

Chairman GOLDWATER. Our former Secretary of the Navy, and one of our best Members, the Senator from Virginia. Do you have any questions to ask?

Senator WARNER. No questions. I thank the Chair—I have had the good fortune of having served with this distinguished nominee many, many years ago in the Department of Defense. I think the country should be grateful that he and his family are willing to dedicate themselves to public service.

We wish you luck. There are some troubled waters ahead for the Department, but I think you will sail them through.

Mr. SIMS. Thank you, Senator Warner.

Chairman GOLDWATER. Well, that about winds it up. We do not have a full committee this morning. I apologize but without objection, we will approve your appointment and then by late this afternoon, we will poll the rest of the members and report your nomination to the floor.

Mr. SIMS. Thank you very much.

Chairman GOLDWATER. Thank you very much, and thank your family for coming. I forgot, I also have a sister named Carolyn. [Laughter.]

Mr. SIMS. You have a good friend named Carolyn, now.

Chairman GOLDWATER. We will now turn to the nomination of Robert K. Dawson to be the Assistant Secretary of the Army for Civil Works. Mr. Dawson is currently serving as the Acting Assistant Secretary, and has previously served as the principal Deputy

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Assistant Secretary of the Army for Civil Works, with the Committee on Public Works and Transportation of the House, and as a legislative assistant to Congressman Jack Edwards.

Mr. Dawson is a graduate of Tulane University and earned his law degree at Samford University. Mr. Dawson also met with the staff of the Committee on Armed Services to ensure that there will be no conflict between his financial holdings and his governmental responsibilities.

I would like to note for the record that although the Committee on Armed Services has responsibility for considering Mr. Dawson's nomination, many of the programs that he will administer as the Assistant Secretary of the Army are within the jurisdiction of the Committee on Environment and Public Works. I am also aware of the fact that the Subcommittee on Environmental Pollution of that committee has held extensive hearings recently on one program for which Mr. Dawson will be responsible, the so-called Section 404 Permit Program.

For this reason, an invitation has been extended to the chairman and ranking minority members of the full committee and of that subcommittee, to participate in this hearing if they wish to.

I also understand that Senators Denton, Heflin, and Trible would like to make comments about the qualifications of the nominee, but none of those—oh, yes, Senator Denton. How could I miss such a big guy as you?

Go right ahead.

STATEMENT OF HON. JEREMIAH DENTON, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator DENTON. Thank you, Mr. Chairman.

Ladies and gentlemen, I am delighted to have the opportunity to welcome my fellow Alabamian and good friend, Robert K. Dawson. I am delighted that this friend and fine man has been nominated for the position of Assistant Secretary of the Army for Civil Works.

He is a man of principle and of accomplishment, well qualified for the position. I am sure that my colleagues and other people here today are aware of the fine work that Bob has done in his capacity as Principal Deputy Assistant Secretary for Civil Works, so I will concentrate on some less well-known aspects of his life and career.

Bob grew up on a farm in Scottsboro, Alabama. He attended Tulane University on a football scholarship, and while there was active in student and extracurricular life. He was very active in the Christian Athlete Program.

After graduation from Tulane he attended the Cumberland School of Law at Samford University in Alabama. He was an outstanding student, on the editorial board of the Law Review, and a member of the Moot Court Team. He was elected as president of the law school's student body.

His professional career has been a perfect preparation for the position to which the President has nominated him. As a staff member for former Congressman Jack Edwards, Bob handled many constituent and legislative problems, including those involving the Corps of Engineers for the First District of Alabama. That is an

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area rich in water resources and in which the activities of the corps are particularly important.

His experience and natural leadership abilities allowed Bob to advance quickly to the position of Administrator of the House Committee on Public Works and Transportation. That committee's responsibility and jurisdiction gave him in-depth exposure to the laws and regulations affecting water resources.

As an aside here, Mr. Chairman and ladies and gentlemen, Bob has not been a patsy on the matter of users' fees. In that respect, you might suspect that coming along from Jack Edwards in Mobile's First District he would have been, but he has been very, very hard-nosed about that. They went from 100 percent cost sharing at first on the inland waterways and are now back to a figure which may be somewhat reasonable. As Senator Warner knows regarding Norfolk and the port, this man is not a pushover in that field at all, and we have to admire his sincerity and hard work in that field.

In 1981 Bob's talent and accomplishments were recognized by his appointment as Principal Deputy Assistant Secretary of the Army for Civil Works. In that position his efforts were focused on the activities and programs of the civil works mission of the Corps of Engineers.

For the past 14 months, Bob has been acting as Assistant Secretary, fulfilling the responsibilities of the position, even though he did not have the formal title and all the authority that comes with it. I am particularly impressed by the fact that Bob's advancement and strong professional performance were coupled with family, church, and civic life activities.

He is married to the former Susan Lee of Louisiana, a lovely lady who is here today. They have two fine children, Amy, age 13, and Steve, age 11, who are in school today. Bob is active in the Trinity United Methodist Church in Alexandria, VA, where he is a member of the administrative board. He devotes his spare time to family activities, including his participation in a singing group that gives free performances in local hospitals, jails, and retirement and nursing homes.

Mr. Chairman, there has been some controversy attendant upon Bob's nomination. I must point out, however, that those concerns have nothing to do with his qualifications, his competence, or his integrity, and nothing to do with him personally. They have to do with a policy issue which you mentioned, Mr. Chairman, the regulatory reform of the Corps of Engineers Permit Program.

I recognize that there will be controversy about the policy governing that program, but that is clearly a policy issue, not an issue of the qualifications of this nominee. Although the issue may warrant debate, I hope that such debate can take place in a more appropriate forum for considering and making policy, not in connection with this individual's consideration to serve our President and our country in an important position.

As I said, the very positions in which he has been serving have placed him necessarily, per se, in controversial issues, and he has earned my respect, although I have not always thought that he was exactly in the right on every issue. But the man is absolutely of integrity, intelligence, and probably highly superior perspective to

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my own regarding the position that he is about to take, and the positions that he has held.

Mr. Chairman, I thank you and my colleagues for the opportunity to introduce an outstanding Alabamian and an outstanding nominee. I am confident the committee and the Senate will recognize his qualifications and his fine personal characteristics, and that we will recommend his speedy confimation.

Thank You, Mr. Chairman.

Chairman GOLDWATER. Thank you very much.

I would like to recognize the fact that the family is also here. Would you please just stand up and let us take a look at you. That is your wife and your son. Welcome, we are glad to have you here.

Senator Thurmond?

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Dawson has had experience on the House Committee on Public Works and Transportation. He has been over in the Defense Department now for some time, and has been acting in this position. He bears the reputation of being a man of ability and character and dedication. I am very pleased to approve his nomination.

Chairman GOLDWATER. John?

Senator STENNIS. Mr. Chairman, I know this gentleman indirectly and to a degree, and what I know about him is favorable for a very highly responsible and important position. I have, myself, made some inquiries and have found him to be favorable. I am supporting him on the merits. I have not spoken to Senator Nunn about this. I suppose he will be here. But I support him on the merits.

Chairman GOLDWATER. I see our other Alabama Senator is here. Would you like to say a few words? We are glad to have you here.

STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN. I am delighted to appear before this distinguished committee and to speak a good word for my longtime friend, Bob Dawson. I have known Mr. Dawson for more than 20 years. He was the president of the Student Government Association at Cumberland Law School back some 20 years ago and I first knew him then, and he was an outstanding leader.

He led the law student groups in an effort to allow senior law students to assist counsel in indigent cases, to represent the indigent in criminal cases where they could be of assistance. They could not appear, but of course they could be of assistance to the counsel, and this was a step forward for the clinical education of young law students, and he was a leader in that.

He came to Washington and was with Congressman Jack Edwards for a number of years, and then was on the staff of the Public Works Committee over on the House, and he has been now, of course, at the Department of Army for a good while. He is a man of integrity. I know his family.

He comes from—I do not know whether this is good or bad, but he comes from a long line of lawyers and that may be good or bad. But, anyway, they are outstanding lawyers and he is from a fine

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background, a man of complete integrity, and I think he will do a great job as the Assistant Secretary of the Army for Civil Works.

I am delighted to be here and assist Senator Denton, from an Alabama viewpoint, in moving his nomination forward.

Chairman GOLDWATER. Thank you very much.

Senator Warner?

Senator WARNER. Thank you, Mr. Chairman. We welcome our two distinguished colleagues from Alabama, speaking on behalf of this nominee.

I should like to request that statements on behalf of myself and Mr. Trible be submitted for the record so that we can continue this hearing. Both statements are highly supportive of this nominee.

[The statements follow:]

PREPARED STATEMENT OF SENATOR JOHN WARNER

I am very pleased to welcome Bob Dawson, a resident of Alexandria, Virginia, who has been nominated by the President for the post of Assistant Secretary of the Army for Civil Works.

I have worked with Bob on many occasions, both in his present job as Acting Assistant Secretary and prior to that as Principal Deputy Assistant Secretary.

I have always found Bob to be very responsive and in touch with the President's programs and the budgetary realities which face the water resources development program.

Even in the face of huge Federal deficits, Bob Dawson has kept the Corps of Engineers water resources development program moving along by looking for new and innovative ways to come up with the money for water projects.

I do not always agree with Bob's proposals in the cost sharing and user fee arena, but, I must say that he is making every effort to provide solutions to very difficult problems.

Earlier this year, for the first time in history, an administration submitted an omnibus water resources development bill containing some 62 projects for authorization.

Bob Dawson has been instrumental in getting this bill to the Hill and with his help, omnibus water resources legislation is moving closer to enactment.

I'd like to acknowledge the presence of Bob's family; his wife Susan, and his son. Steve is a 6th grader at George Mason School in Alexandria. He also has a daughter Amy who is in the eighth grade at George Washington Junior High School in Alexandria.

Because of Bob's vast experience here on the Hill, including three years with Congressman Jack Edwards of Alabama, and nearly seven years on the staff of the House Public Works and Transportation Committee, he understands the way the process works up here on the Hill.

Coupling that with his four-plus years in the Reagan Administration, he is uniquely qualified to perform the difficult job of Assistant Secretary of the Army for Civil Works.

The President has exercised extremely good judgment in nominating Bob, and I hope that the Senate will expeditiously confirm him.

PREPARED STATEMENT OF SENATOR TRIBLE

Mr. Chairman, I am pleased to introduce to you Robert K. Dawson of Alexandria, VA. I am convinced, given his extensive experience in public works and in particular his fine work with the Corps of Engineers, that there is no individual better qualified for the position of Assistant Secretary of the Army for Civil Works.

My staff and I have worked with Mr. Dawson closely during his service in the Office of the Assistant Secretary of the Army for Civil Works. We've dealt with both corps projects in my district and regulatory matters on behalf of my constituents. I found him to be courteous, responsive and helpful. It is a pleasure for me to recommend Mr. Dawson strongly to this committee for the post of Assistant Secretary of the Army for Civil Works.

Senator WARNER. I have had the privilege of working with him and I share the opinions that his integrity and character and abili-

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ty are impeccable. It seems to me that the source of the controversy may well find its origin in the Presidential Task Force on Regulatory Relief, in that the nominee has been carrying out the directions of this task force, and therefore the questions with respect to his policy decisions may well rest with the task force and not the nominee.

I am glad that the Chair has afforded a complete hearing so that we can perhaps get this cloud removed so that he can continue to serve his country.

Chairman GOLDWATER. Senator Denton?

Senator DENTON. I somehow did not notice Senator Stennis over there, but in the matters in which this gentleman has been affecting waterways, I certainly, as well as mentioning Senator Warner's interest, and of course, Senator Thurmond's with respect to Charleston, Senator Stennis has been a bulwark in that Tennessee Tombigbee Waterway, as he has been the bulwark in so many things on this committee for many years.

I did not mean to fail to defer to that great gentleman.

Chairman GOLDWATER. Thank you very much.

The nomination reference and résumé of Mr. Dawson will be inserted in the record at this point.

[The nomination reference and résumé of Mr. Dawson follows:]

NOMINATION REFERENCE

AS IN EXECUTIVE SESSION,
SENATE OF THE UNITED STATES,
June 3, 1985.

Ordered, That the following nomination be referred to the Committee on Armed Services:

Robert K. Dawson, of Virginia, to be an Assistant Secretary of the Army, vice William R. Gianelli, resigned.

RÉSUMÉ OF ROBERT K. DAWSON

Employment: May 1984 to present: Acting Assistant Secretary of the Army (Civil Works).

Duties and Responsibilities: Formulates, develops, and implements Secretary of the Army, Secretary of Defense, and Administration policies with respect to the civil works activities of the Department of the Army, administration of Arlington and Soldier's Home National Cemeteries, activities of the Panama Canal Commission, and Corps of Engineers nation-building programs overseas. Has policy oversight and analysis of critical elements of the Corps of Engineers civil works program for water resources and its regulatory program over the waters of the United States. Reviews legislative and regulatory proposals of the Department of the Army and other Departments. Represents the Department (Secretary) in discussions with Members of Congress and presents testimony before congressional committees and other groups. Represents the Department (Secretary) in discussions with the Office of Management and Budget, other Departments of the Federal Government, and outside groups. Reviews significant water resources development projects and permit actions and resolves conflicts on such matters.

May 1981 to May 1984: Principal Deputy Assistant Secretary of the Army (Civil Works).

Duties and Responsibilities: Assists in the details of all of the above duties on a day-to-day basis.

August 1974 to May 1981: Administrator, Committee on Public Works and Transportation, U.S. House of Representatives.

Duties and Responsibilities: Directed committee staff (staff numbered 98 at one point, later reduced to 82); responsible for hiring of legislative, administrative, and clerical staff; prepared annual budget of over $3 million, presented to Committee on House Administration, and, upon approval of budget, ensured proper ethical and ac-

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counting practices on all matters involving this budget as it related to staff and to Members of Congress; directed biennial organization of Committee and Subcommittees. Extensive work with top officials of trade associations and public interest groups as well as local, State, and Federal officials.

January 1972 to August 1974: Legislative Assistant, U.S. Representative Jack Edwards.

Duties and Responsibilities: Prepared a brief for the Member on all bills coming to the floor; reviewed testimony and prepared questions for witnesses (including department and agency heads) before Subcommittee on Transporation, Subcommittee on Treasury, Postal Service, and General Government, and Subcommittee on Defense (Security clearance obtained to review classified and secret material), House Committee on Appropriations; wrote floor statements and public speeches: extensive work with local, State, and Federal officials; handled large volume of legislative correspondence; researched legislative and legal issues, including Federal campaign finance laws; represented and spoke for the Congressman at meetings; handled district-wide problems and constituent concerns.

Education: Senior Managers in Government course, Harvard University, Summer, 1979.

Cumberland School of Law, Samford University (Juris Doctorate, 1971). Admitted to State Bar of Alabama, 1971.

Awards and Activities: Law Review Editorial Board (Authored article in Fall, 1970, Cumberland Samford Law Review, page 316, entitled, "Law Schools or Lawyer Schools in Alabama? A Proposed Legal Internship Program"); President, Student Bar Association; International Law Moot Court Team; American Jurisprudence Book Awards; Who's Who in American Colleges and Universities; National Legal Aid and Defender Association Award; Dean's List; Alabama Defense Lawyers Association scholarship; International Academy of Trial Lawyers Award for Distinguished Achievement in the Art and Science of Advocacy; Omicron Delta Kappa honorary; Law Student Division, American Bar Association Silver Key Award.

Tulane University (B.S., Psychology and Chemistry, 1968).

Awards and Activities: Varsity intercollegiate football, four years (attended on football scholarship); Fellowship of Christain Athletes; vice president of senior class, College of Arts and Sciences; Scabbard and Blade Honorary Society; Distinguished Military Student Award.

Personal data: Born January 22, 1946, married to Susan Lee Dawson, two children, 11 and 12 years of age; six feet tall, 182 pounds; lifelong active member of United Methodist Church.

Personal interests: Family activities; athletics of all kinds as participant and spectator; music (leader of and guitarist/vocalist in country-gospel singing group which performs monthly in local hospitals, retirement and nursing homes, and jails); civic activities; church work, Trinity United Methodist Church, Alexandria, Virginia.

Chairman GOLDWATER. Mr. Dawson, would you like to say a few words?

STATEMENT OF ROBERT K. DAWSON, ASSISTANT SECRETARY OF THE ARMY-DESIGNATE FOR CIVIL WORKS

Mr. DAWSON. Thank you, Mr. Chairman. I do have a prepared statement that I would ask your permission to be placed in the record in its entirety.

Chairman GOLDWATER. That will be done.

Mr. DAWSON. Thank you, sir. First, I would like to thank Senator Denton and Senator Heflin for their generous introduction, and to thank each of you for the comments that you have made.

I am very proud that President Reagan has seen fit to nominate me for this position. His confidence, and hopefully that of this committee, will certainly inspire me to work hard in the days ahead.

I might point out just a couple of points. One is that during my professional career I have been associated with Federal Water Resources Development activities for going on 15 years. I have come to know and respect the great contribution the Corps of Engineers makes to the Army and to the Nation in peacetime, and its poten-

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tial for invaluable assistance to the military missions of the United States in time of military emergency.

I have found my work in the Office of the Assistant Secretary of the Army to be both professionally and personally rewarding. I look forward, Mr. Chairman, to working very closely with the Congress to preserve and enhance our Nation's water resources. A close and responsive working relationship with the Congress is doubly important to me, since I spent roughly the first 10 years of my career here on the Hill and I value very highly the points of view of the Congress, collectively and individually.

I thank you for this opportunity to appear before your committee, and would welcome any questions you would like to ask.

[The prepared statement of Mr. Dawson follows:]

PREPARED STATEMENT OF ROBERT K. DAWSON, ACTING ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS)

Mr. Chairman and members of the committee, it is with great humility and a deep sense of responsibility that I come before you today with respect to my nomination for the position of Assistant Secretary of Army for Civil Works. I would like to make a few brief comments. I do have a prepared statement which, with your permission, I will submit in its entirety for the record.

As you know, the primary responsibility of the Assistant Secretary of the Arny for Civil Works is the oversight of the Civil Works Program of the U.S. Army Corps of Engineers. In that connection, let me say that I first became aware of the great projects constructed by the Corps of Engineers for flood control, navigation and recreational purposes during my boyhood in Alabama.

As my biographical sketch indicates, during my professional career, I have been associated with Federal public works activities for more than 13 years. As administrator from 1974 to 1981 for the Committee on Public Works and Transportation of the U.S. House of Representatives, I had the opportunity to become familiar with the high regard Congress has for the Army Corps of Engineers.

As principal Deputy Assistant Secretary of the Army for Civil Works from 1981 to 1984, I have grown to know and respect the professionalism of the corps and to appreciate the great contribution the Corps of Engineers makes to the Army and Nation in peacetime and its potential for invaluable assistance to the miliary missions of the United States in times of military emergency.

In my judgment, Mr. Chairman, the Corps of Engineers is the finest engineering organization in the world. The corps provides the Army and the Nation an unparalleled ability to plan, design and construct great engineering projects of all kinds.

Moreover, the corps executes its mission in an efficient and cost-effective manner which should be the envy of many Government agencies. It is that unique combination of outstanding engineering ability and cost effectiveness which has led many foreign nations to ask for corps assistance in planning and executing large projects.

The corps is able to execute its mission in such an effective manner because of the unique blending of well-trained and broadly experienced civilian staff with the professional management expertise of career military officers. I should also point out that the Corps of Engineers is the manager of one of the largest inventories of completed capital projects in the world.

These projects provide a broad range of public benefits, including navigation, flood control, hydroelectric power, water supply, and recreation. Collectively, these projects are vital to the economic well-being of our Nation and represent a significant management challenge.

My goals for the Army Civil Works Program are threefold. First, I intend to continue to work with Congress to develop a new charter for water projects which will allow the construction of new projects to resume in spite of the current Federal budget deficit.

In this regard, let me point out that I believe the administration and Congress have come a long way during the last 4½ years toward developing a new commission for the corps in water project construction. I have every hope and expectation that we will see the culmination of these years of effort in the very near future.

I would hope to continue to work to make the Corps of Engineers Regulatory Program more responsive to the regulated public while retaining all statutorily provided environmental safeguards.

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Thirdly, I intend to ensure that the most productive uses are made of the vast investment which has been made in water projects managed by the Department of the Army. I believe that management of these very valuable investments is perhaps less exciting but just as important as the management of the planning and implementation of new water projects.

The continuing growth and dynamic changes which characterize our modern economic system present new demands on our existing projects. It is my intent to ensure that the Department of the Army responds effectively to these changing demands for water project outputs over time.

In addition to the civil works responsibilities of the Army Corps of Engineers, the Assistant Secretary for Civil Works has, among other duties, responsibility for overseeing the administration of the Arlington and Soldiers' Home National Cemeteries.

In closing, I would like to say that I have found my work in the Office of the Assistant Secretary of the Army for Civil Works to be both professionally and personally rewarding. I look forward to working closely with Congress to preserve and enhance our Nation's water resources. I thank you for this opportunity to appear before your committee and welcome any questions you would like to ask.

Chairman GOLDWATER. Well, thank you. I think the Senators of the committee who are here have completed their questioning. I see the Senator from Vermont has just come in, and he being the Chairman of the Environment and Public Works Committee that we invited to attend this meeting and participate, is open to question the witness.

STATEMENT OF HON. ROBERT T. STAFFORD, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator STAFFORD. Mr. Chairman, I have a brief statement I might make.

Chairman GOLDWATER. Just sit down and do it anyplace.

Senator STAFFORD. Mr. Chairman, I appreciate the courtesy and the opportunity to say a word here. I shan't direct any questions to Mr. Dawson, but I do have a brief statement I would like to make for the record.

As this committee knows, most of the responsibilities of the Assistant Secretary for Civil Works falls within the jurisdiction of the Committee on Environment and Public Works, which I have the privilege of chairing. We authorize all the water resources work of the Army Corps of Engineers, for which the nominee would be responsible.

We also hold responsibility for the section 404 program of the Clean Water Act which Mr. Dawson will administer. It is this latter program that I would like to discuss with the committee very briefly.

Since Mr. Dawson became Acting Assistant Secretary more than a year ago, with our approval, our committee has sought to work with him to assure implementation of the congressional intent of the section 404 program to protect wetlands. Frankly, Mr. Chairman, we have not been very successful. We have been frustrated continously by the positions taken by Mr. Dawson.

He has sought to run the program in a manner that we, in our committee, believe has ignored the environmental impacts of development on our Nation's wetlands. Our committee has conducted three oversight hearings on this issue, and we have a fourth scheduled for September 18.

It would be my suggestion, Mr. Chairman and members of the Committee on Armed Services, that you review carefully our hear-

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ing record on Mr. Dawson's administration of the section 404 program, including the record of the hearing we will hold next week, before you take action on this nomination. It would also be my suggestion that your committee, Mr. Chairman, stress to Mr. Dawson in the clearest possible way the need to implement section 404 of the Clean Water Act as it is written by Congress, and not the way Mr. Dawson wishes the Congress had written it.

Mr. Chairman, I would ask that this committee, by reference at least, make the hearing records of the three hearings we have held on section 404 a part of your record, and we will supply the committee with a copy of the record we will make on September 18.

Senator THURMOND [presiding]. Without objection, that will be done.

[The hearings: "Oversight Hearings on section 404 of the Clean Water Act," May 21, June 10, July 15, and September 18, 1985, pp. 1-321, printed for the use of the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, U.S. Senate, 99th Congress, 1st session; retained in committee files.]

Senator STAFFORD. Thank you very much, Mr. Chairman.

Senator WARNER. If I might just direct an inquiry to the distinguished chairman. First, I met this morning with the counsel of this committee and indeed the counsel for this committee has reviewed the record as prepared by your committee, and as now ruled by Mr. Thurmond, will now become part of our record.

Senator Chafee also spoke to me, and I wonder what we can do to protect such interests as he may have remaining in this case. I know he was notified of the hearing this morning.

Senator STAFFORD. Mr. Chairman, I think he is due here momentarily to speak also. He is the chairman of the subcommittee of the Environment Public Works Committee that has jurisdiction over section 404, and so he is particularly interested.

It has been my hope that we could appear here together, but unfortunately I am scheduled to chair a Committee on Education meeting momentarily and for that reason I felt I should seize the opportunity to go ahead at this time.

Senator THURMOND. Thank you very much for coming.

Senator WARNER. Could I make one last observation? I am trying to look into this thing in a very objective way, and there is some representation that this nominee has followed the directives of the Presidential Task Force on Regulatory Relief, and that may well be the cause of some of the concern, as opposed to him personally, and what he has done.

He has carried out the orders of this task force. Is the Chairman able to——

Senator STAFFORD. I do not think I am in a position to comment on that, except to say that since we in the Congress wrote the law, we would expect that administrators would comply with the law as it is written, as I said in my statement, not as they might wish it were written.

Senator WARNER. "They" being the task force?

Senator STAFFORD. As well as Mr. Dawson. I think it is incumbent upon those who think the law is erroneous to ask us to change

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it, not to do it by administrative action. Otherwise, we simply might as well not be here.

Senator WARNER. I thank the chairman.

Senator STAFFORD. Thank you, Mr. Chairman.

Senator THURMOND. Thank you very much.

Are there any other witnesses here to testify?

Senator WARNER. I was just going to suggest that the Chair might ask the questions which we ask of all nominees.

Senator THURMOND. Mr. Dawson, do you agree to appear before this committee or any other committee of the Congress whenever you are asked to, and fully and completely answer any questions posed by a congressional committee?

Mr. DAWSON. Absolutely, Mr. Chairman.

Senator THURMOND. Mr. Dawson, could you explain to the committee what in your view is the controversy over the administration of the Section 404 Permit Program? It might be helpful if you would give us a brief description of what the program is.

Mr. DAWSON. Yes, Mr. Chairman.

Senator WARNER. Mr. Chairman, would you note the presence of the Senator from Tennessee? He might well wish to make a brief statement before the witness responds.

Senator THURMOND. Mr. Dawson, if you will just withhold for a minute, I notice the distinguished Senator from Tennessee, Senator Gore, has come in.

Senator Gore, do you have a statement you wish to make?

STATEMENT OF HON. ALBERT GORE, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator GORE. Mr. Chairman, I will put it in the record. I meant to be here to introduce Mr. Sims. I understand that he has already left. He is a friend and very qualified person and I will put my statement in the record.

Senator THURMOND. Without objection, your statement will go in the record prior to Mr. Sims' statement.

Senator GORE. Thank you.

Senator THURMOND. You may proceed, Mr. Dawson.

Mr. DAWSON. Thank you, Mr. Chairman.

Senator THURMOND. Mr. Dawson, I have another committee meeting. I am going to ask Senator Warner, next in line on the committee, if he will take the chairmanship.

Senator WARNER [presiding]. Happy to do so. Thank you very much.

Senator DENTON. Mr. Chairman, Senator Warner, I will have to depart to prepare for that same meeting, if I may be excused.

Senator WARNER. Any other Senators desiring to be heard before the witness proceeds?

I recognize the Senator from Texas.

Senator GRAMM. I would just like to say, Mr. Chairman, that the people of my State, Texas, have had a long and successful working relationship with Mr. Dawson. I totally support the actions that he has taken.

I think he has attempted to do something that people in the administration should do, and that is to carry out the mandate of the

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President. I deeply resent people who attack the President's program by attacking nominees rather than the President and the program, and I want to assure you, Mr. Dawson, that I am going to make a project out of your appointment.

If somebody is going to block this appointment, they'd better get up mighty early in the morning, because I think you deserve to be approved by the Senate. I think your record is a sound record of achievement. I think your efforts to bring reason and responsibility to balancing our effort to get on with the job of producing jobs in America, as compared with our simultaneous goal of protecting the environment, your effort and Reagan's effort to bring reason and responsibility is something that was long overdue.

I applaud your record, and I am going to make it my personal business to work every day until you are approved by the Senate.

Senator WARNER. Thank you, Senator.

The Chair recognizes the distinguished ranking minority member of the committee.

Senator NUNN. Thank you, Mr. Chairman. I appreciate it. Let me do some catching up. I will pass for the moment.

Senator WARNER. If no other Senator seeks recognition—Mr. Dawson, you have a pending question.

Mr. DAWSON. Thank you, Mr. Chairman. The question, to review, I believe was to describe the program that has had some concerns raised about it.

The program that is involved is the Corps of Engineers regulatory program which regulates the deposition of dredged or filled material in the waters of the United States. This originates from the Clean Water Act of 1972. There were major amendments in 1977.

The program, by its very nature, had built-in controversy. The Corps of Engineers has the very difficult task of balancing the very legitimate, very real environmental concerns against the equally real and equally legitimate developmental concerns, and the Congress gave it that task of balancing those concerns.

I think the followup actions which have raised some concern center around the reforms of that program which the administration has undertaken in the last 4 years. It is my strong belief that those reforms have been taken without sacrificing environmental safeguards in any way, but what we have done has been to shorten the length of time it takes on the part of the regulated public to get an answer.

That answer may well be no, but what we found to be intolerable was the length of time, the uncertainty, the duplication, the red tape that was involved in the program.

We are not suggesting that we have been perfect in the administration of the program. We are certainly open to adjustments, if the record can be shown that such adjustments are needed.

Senator WARNER. If there is no further comment from other Senators, I will proceed to a second question.

What, in your view, would be the problems of reinstating automatic elevation of agency disagreements?

Mr. DAWSON. Senator, I think the main problem there is the confusion and uncertainty that that creates within a Government program. I think any program where it is unclear who is in charge

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automatically creates confusion in a bureaucracy that is not needed.

On the other hand, I think it is vitally important that I and others involved in the program make certain that the views of the Federal agencies that have a very strong interest in the program are given full and fair consideration, and I believe we have taken steps to ensure that.

Our position is that once those views have been heard, then the public deserves a decision without unnecessary delay through an elevation process.

Senator WARNER. Are most of the changes that have been made in the section 404 program proposals developed by the Presidential Task Force on Reguatory Relief?

Mr. DAWSON. Yes, sir. In fact, the elevation matter you just mentioned is very specifically outlined there, that there is to be no automatic elevation. We received a reform charter in July 1982—or actually, I believe it was May 1982—that set out in very specific steps the reform steps that were required after a very intense look at the program, a look that involved all of the Federal agencies.

So, the answer to that, in short, is yes.

Senator WARNER. Do you feel that directives promulgated by that task force are at variance with the law?

Mr. DAWSON. No, sir, and that is certainly one of the great concerns I would have, that this committee might feel that I or anyone else in the Army has not been carrying out the law.

I think we are all aware of the lack of reticence on the part of concerned parties to bring litigation in these areas, and our record has been quite good when the elements of the reforms have been challenged. We do not believe we have done anything to try to change the law through administrative actions or to do anything less than vigorously comply with the law.

Senator WARNER. Could you explain the issue regarding intermittent wetlands, and what your policy has been? Perhaps that question should be rephrased. It is, what is the policy of the Task Force on Regulatory Relief?

Mr. DAWSON. Mr. Chairman, I believe the issue there is isolated wetlands, also sometimes referred to as intermittent wetlands, and the issue there is how far out, away from traditionally navigable waters, should the Army Corps of Engineers reach in its jurisidiction.

The policy, that particular policy, was not specifically addressed by the task force, and in fact we have taken absolutely no steps to change the policy of the Army on that subject. The main issue there, as I understand it, is what kind of connection with interstate commerce must there be before the Federal jurisdiction is exercised.

That is a very complex legal issue, and I do not believe there is any basic disagreement between the agencies. We have been working hard since the last hearing that Senator Chafee had, to clarify the position, but again I would indicate to you that we have not attempted in any way to change the Army's approach to that particular issue.

Senator WARNER. That begins to approach the end of my questioning, and I defer to the Senator from Georgia.

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Senator NUNN. Mr. Chairman, just a brief comment on the previous nominee, Mr. Bob Sims. I had a telephone call from Graham Claytor, who I know this committee has a high regard for, and he wanted us to know of his very high regard for Mr. Sims, having worked with him, and that he felt he would do an excellent job in this important new responsibility.

I understand that the status of that—I regret I was at another meeting and could not make the beginning of this one—is that that nomination is being polled.

Senator WARNER. The Senator is correct, and indeed I am glad to have added the views of Mr. Claytor. They were brought to my attention and he is held in high regard by this committee, as the Senator well knows.

Senator NUNN. Mr. Dawson, I do not have many questions. These objections to your nomination have just come to my attention, and I am not really prepared to go into great depth about some of the controversy.

I think this committee has to take a look at it. We have other Senators who now have raised serious questions about the administration of some of the wetlands provisions, but you have heard, I suppose, the charges and you are more familiar with them than we are. I am sure you have already addressed some of them.

Let me just ask you a general question, because everything I have heard about the job you have done has been on the plus side. I have had no objections at all. I do think that any time a fellow Senator has raised questions, we have to at least be able to answer them when we go to the floor with a nomination.

What is your general philosophy—and perhaps if you have already given this explicitly you can just summarize it—about the competing interests which confront the Corps of Engineers projects, usually between development and environment. How do you approach that in a general sense?

Mr. DAWSON. Senator Nunn, if I may, before I answer that specific question, I would like to point out that I have been gratified that to my knowledge no Senator has objected to my confirmation. I think some legitimate concerns have been raised, and I know we are attempting to address those here, and a series of hearings over in the policy committee as well. Three of those have been held, and a fourth will be held next week.

To answer your questions—well, I might continue, briefly, that it has been gratifying to me that no issues have been raised about my qualifications for this job or my competence or integrity, a fact which I deeply appreciate.

Senator NUNN. I agree with that assessment. I have heard nothing on those counts.

Mr. DAWSON. On the policy issue, my philosophy is that the Army and the Corps of Engineers must do what the law requires us to do, and that is to balance these competing interests as best we can, and that is a very difficult, not always perfect process.

We process some 12,000 to 13,000 of these permit applications annually. The basic objective when we do that, and one which I share, is to try to arrive at what we call the public interest, and we conduct what we call a public interest review which means that you weigh the very real environmental concerns such as wetland losses

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or wetland damages, and weigh those against job creation, private property rights, and other interests.

Certainly, the environmental concerns should always be given very close attention. Probably 30 to 40 percent of the permits that are issued by the corps are heavily conditioned so that even though the applicant gets the permit, there are conditions placed on the applicant so that the environmental injuries are minimized or done away with altogether, and I certainly endorse that approach.

One last philosophy that I would mention is the need to give the public an answer within a reasonable period of time, and our objective there is 60 days. We know we will not meet that on some of the more controversial actions, but we feel that even if the answer is no, the regulated public deserves that answer in a reasonable time so they can plan their affairs.

I might point out, finally, that well over half of these 12,000 to 13,000 applicants are not large companies. They are what I would call Mom and Pop operations, who have, I think, even a greater need for a reasonably quick answer.

Senator NUNN. Well, I know these are very difficult and very sensitive subjects in terms of weighing those competing interests, and I also understand that the Corps of Engineers is in a position where you are likely to be blamed no matter which way you decide on many of these questions.

Senator Stennis is very familiar with a project that has just been dedicated, and that you had an awful lot to do with the authorization of it down in my State of Georgia, the Richard Russell Dam. We dedicated it last week, and the Corps of Engineers was involved very heavily in that, and there were environmental concerns.

I met with one of the people who was most opposed to the project, and the comment that I thought was a very complimentary remark in favor of the Corps of Engineers' work was that he still did not believe the project should have been done but he felt the Corps of Engineers, since it was done, had done the very best job that could be done to mitigate the environmental problems with it.

Of course, the corps does not always make the decision. We make the decisions on the final money on projects, but I thought that was at least a testimony to the growing sensitivity of the Corps of Engineers in these areas, which I think is absolutely essential.

But, it is a tough job, and Mr. Chairman—I do not know whether you, Senator Stennis and Senator Gramm have had all of your questions answered, but do we have any of our other colleagues that want to be heard on this?

Senator WARNER. I thank the distinguished Senator from Georgia. It is the intention of the Chair to momentarily adjourn the hearing, subject to recall of the Chair, to accommodate Senator Chafee.

I do have a few more questions. I want to make certain that this witness has the opportunity to provide for the record in open session responses to inquiries. These, I think, have been put on by some environmental groups and I think it is important that their concerns be addressed

Senator GRAMM. I would have to say that it is fair to say from my point of view that I have looked at this very closely and made up my mind to strongly support Mr. Dawson, and the reason I have

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is that as you can imagine, in a big State like Texas that has chronic water problems, I feel that I live with the Army Corps of Engineers all the time.

We have two different jurisdictions in our State, one of them in Fort Worth that covers most of the State, and then we have one in Galveston that covers our coastal area, and we are always working with the Army Corps of Engineers.

Our city and county governments often find themselves either working with or in conflict with the corps, and they end up in conflict in many cases where a set of rules do not meet the reality of the situation.

I will give you an example, and it relates to the fact that the person giving me the example yesterday, Commissioner Eccles who is one of the county commissioners of Harris County, Houston, TX, who left me with a final word: Whatever you do to help us with this problem, for God's sake, see that Dawson gets confirmed because he is at least somebody who will listen to local government about our concerns.

The example that he was talking to me about yesterday is, we have a flooding problem in Houston when it rains because the land is so flat, and we have a series of reservoirs that on paper look like lakes, but the truth is, they are dry most of the time and they often don't have more than a couple of feet of water in them.

When they do have water, however, they have significant acre-footage because the water stands there a long time. The problem this county commissioner had was a requirement to spend over $100,000 of the county's money to raise the power lines on this one particular reservoir to meet the standards on that amount of acre-footage set out for sailboats, raising the power line to over 30 feet above what the lake would be at its flood stage.

The problem is, at flood stage it is not more than 3 feet deep, so there is never going to be a sailboat on this reservoir, but it is looking at spending $100,000 of the county's money to raise the power lines for a deepwater sailboat because of acreage-footage, when even at flood stage it is not more than 3 feet deep.

His interest in having Mr. Dawson is that the experience of Houston, TX, which is just one city though a big one in my State, is that Mr. Dawson has been a person that they could get to actually look at the facts in trying to apply the regulations on a realistic basis, and in trying to work with a bureaucracy that is often so bound up in simply stating a regulation rather than trying to get the facts.

That impresses me, and that is why I am so strongly in favor of this appointment because it is supported by the people back in my State, city commissioners, county commissioners, river authorities that have been established by our State government to try and develop our rivers.

I believe that Mr. Dawson is a person that they can work with and who is reasonable and responsible in looking at both sides of the issue, and I cannot think of a stronger recommendation for Mr. Dawson than people on the county commission back home thinking the appointment is important. To me, that is a very powerful recommendation, and one that certainly affects me.

Thank you, Mr. Chairman.

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Senator WARNER. I thank the Senator from Texas. I will just continue here, momentarily.

What is the status of the memorandum of agreements with other Federal agencies?

Mr. DAWSON. Senator Warner, we have spent many hours in the last several months working between the Federal agencies to try to come up with new memorandum of agreement that respond to the concerns that Senator Stafford mentioned earlier and that Senator Chafee has raised.

There is really one reason why we have spent that tremendous amount of time at the highest levels in trying to negotiate a new memorandum of agreement, and that is because of the concerns that the Senators have expressed which we take very seriously. In my judgment, out of the five, basically five issues that have been involved in this memorandum of agreement, we have resolved well over half of those, and it is my hope that we can ultimately resolve all five, but in a way that does not scuttle the positive reforms that we have been able to achieve.

I am optimistic that with the support of my friend, Bill Horn at Interior, and with the folks at EPA who have worked very hard on this as well, that we will be able to come up with a memorandum of agreement that will allay many, if not all of the concerns that have been expressed.

Senator WARNER. What is the role of the States under the administrative policies of section 404 which you have adopted?

Mr. DAWSON. Role of the States?

Senator WARNER. Yes.

Mr. DAWSON. Well, sir, at least two points on that. As I think the Senator is aware, no Corps of Engineers permit can issue without a State water quality certification, which means that each State in which a permitted activity occurs has that opportunity to in effect veto a Corps of Engineers permit.

So, we have that insurance that the State views will always be factored in. It is also part of one of the goals of our reforms, to increase the roles of the State and as the law directs us to do, eventually turn over to the States the regulation in the 404 area.

Senator WARNER. Had you finished your response? Forgive me for being disruptive there, momentarily. Could you explain what the controversy is about the definition of fill material, and your position on this?

Mr. DAWSON. Yes. sir. The definition of fill material involves who regulates the placement of fill, garbage if you will, municipal waste and garbage and other garbage-related material in wetlands.

The issue is whether the Army Corps of Engineers should regulate it or whether EPA should regulate it under its solid waste authority. The Army position has been that if the primary purpose of the fill is to create fast land, then we feel that the Army should regulate it.

If, on the other hand, the primary purpose is to dispose of garbage, then we have felt that EPA had the best expertise to do that. We are not at all happy with the fact that this disagreement has gone on long before I came along. It predated 1981.

What we have done on the positive side is set ourselves on a timetable that I believe will result in a decision by the end of this

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calendar year, over which agency could best serve the public regulating this kind of fill. Both agencies have completed recently a survey of their field offices to try to get a handle on just exactly what the scope of the problem is, and leading up to deciding which agency has the best expertise to handle the problem.

So, I do believe we are now on a good track to resolving this problem.

Senator WARNER. The Chair recognizes the Senator from New Hampshire.

Senator HUMPHREY. Thank you, Mr. Chairman.

Good morning, Mr. Dawson.

Mr. DAWSON. Good morning, sir.

I have a statement which I would like to insert for the record.

[The prepared statement follows:]

PREPARED STATEMENT OF SENATOR GORDON J. HUMPHREY

Mr. Chairman, I must reluctantly oppose the nomination of Mr. Robert K. Dawson for the post of Assistant Secretary of the Army for Civil Works, and it is my intention to vote against reporting this nomination to the full Senate.

It is always difficult to oppose an individual nominated by the President. In this case, however, my concerns are significant enough for me to take this action. For more than a year, as Acting Assistant Secretary, Mr. Dawson has had supervisory authority over the administration of section 404 of the Clean Water Act. Before that, Mr. Dawson served as Deputy Assistant Secretary of the Army for Civil Works. Section 404, along with other sections of the Clean Water Act, provide that no discharge of dredged or fill material may be made into the Nation's waters, including wetlands, except pursuant to a permit. Under the law, the U.S. Army Corps of Engineers is designated as the principal agency with authority over the permitting process.

Put simply, section 404 stands at the center of our national effort to protect some of our most valuable natural resources—wetlands. Wetlands play a vital role in the survival of many species of fish and wildlife. But, this resource is clearly threatened. According to fish and wildlife estimates, 56 percent of the original wetlands in 48 States have been lost and 11 million acres of vegetated wetlands were destroyed over the last three decades.

Thus, the position of Assistant Secretary of the Army for Civil Works is an extremely sensitive one. It carries with it an important responsibility to protect valuable natural resources. Events over the last several years suggest that Mr. Dawson has not been fully committed to discharging his duties under the law in terms of effective wetlands protection. During the course of extensive oversight hearings on the 404 program which have been held this year before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, Mr. Dawson has repeatedly expressed his belief that "Congress did not design section 404 to be a wetland protection mechanism and it does not function well in that capacity." At the most recent hearing—held on September 18—Mr. Dawson again reaffirmed this view. At another hearing this year—held on May 20—Mr. Dawson stated, "The Congress has never addressed the issue of wetlands jurisdiction . . . we believe the issue of wetland jurisdiction of the CWA demands appropriate legislative direction." On June 20, our distinguished colleague and Chairman of the Committee on Environment and Public Works, Senator Stafford, responded, "I know Mr. Dawson disagrees, but as one Member of the Congress who has had more than a passing interest in the Clean Water Act of 1972 and 1977, I can assure Mr. Dawson that it was the intent of the Congress that wetlands are important and are to be protected under section 404 of the Clean Water Act. For an agency as important to this task as the civilian arm of the Army Corps of Engineers to hold otherwise is to frustrate the very goals of the act."

It has become apparent that Mr. Dawson has sought to translate his interpretation of the law into policy. The result has been an adverse effect on environmental protection, as well as constant turmoil and conflict between Mr. Dawson and his colleagues within the administration. One of the major conflicts surrounds the implementation of an interdepartmental memorandum of agreement [MOA] that was signed between the Army, the Departments of Interior and Commerce and the Environmental Protection Agency. This MOA generally restricted the ability of EPA, the

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Fish and Wildlife Service and the National Marine Fisheries Service to protect fish, wildlife and water resources through permit review. The EPA became so frustrated with the MOA that it terminated it. However, the Department of Interior had no such option, and was essentially stuck with the corps' one-sided administration of the program. Efforts to revise the MOA were frustrated by an intransigent Corps of Engineers. At one point former Assistant Secretary of the Interior, G. Ray Arnett, became so frustrated that he wrote to Mr. Dawson, "for nearly 2½ years, our departments have been involved in an exchange of views relative to the Department of the Army's implementation of our interdepartmental memorandum of agreement [MOA]. It is now abundantly clear that further correspondence on this issue is pointless and that Army's regulatory program is so flawed, it is no longer a useable tool to adequately protect wetlands..."

The bottom line in all of this is ensuring the protection of the environment. That is the corps' responsibility under the law, and they have not been living up to that responsibility. One recent action involving the 404 program recently came to my attention, and I commend it to the committee as an example of the issues we are talking about. The issue involves the construction of a shopping mall on 30 acres of wetlands known as Sweedens Swamp in Attleboro, MA. the EPA, the Fish and Wildlife Service, and the New England division of the Army Corps of Engineers have all concluded that this site provides excellent habitat for a wide variety of fish and wildlife. When a section 404 application was filed with the Corps of Engineers in July 1984, the EPA objected to the issuance of the permit. Perhaps most importantly, EPA was concerned that this nonwater dependent project did not comply with existing guidelines because there were practical, less environmentally damaging alternatives available to accomplish the basic project purpose.

The New England Corps of Engineers also agreed that the permit should be denied. However, the division was effectively overruled by corps headquarters, which determined that adverse effects of the discharge could be mitigated by the creation of wetlands off-site. Corps headquarters then ordered the New England division of issue the 404 permit.

In my view, this is an incredible distortion of the intent of the law. Section 404 is designed to protect wetlands from needless destruction. The construction of a shopping mall, when clear and practical alternatives exist, does not fulfill this objective. Fortunately, the fine regional administrator for EPA's region one took exception to the corps decision, and used authority available to him to initiate a process which could lead to a veto of the corps' issuance of the permit. The EPA official—Mr. Mike Deland—stated, "from the evidence made available to date, the average impacts to wildlife that could result from the destruction of Sweedens Swamp are unacceptable because they are avoidable."

Mr. Chairman, let me again state that I am reluctant to oppose a nomination made by the President. But the issues involved here are important ones. In my view, Mr. Dawson's administration of the section 404 program has not been acceptable, and my vote reflects this determination. I stand ready to do all I can as a member of this committee, as well as a member of the committee on environment and public works, to work with Mr. Dawson in an effort to make progress on some of these issues. I am optimistic that we will be able to do so. Until that time, however, I must stand in opposition to this nomination.

Senator HUMPHREY. Mr. Chairman, I have been asked by Senator Chafee, my colleague on the Environment Committee, to request the committee to defer a vote on Mr. Dawson's confirmation until some time after next week when the fourth and presumably final hearing by the committee on the Army's discharge of its responsibilities under section 404 would be completed.

Of course, Mr. Dawson is playing a key role in the Army's responsibility in that area, and Senator Chafee would ask the committee's forbearance to withhold action until such time. Senator Chafee wants to make it clear he has no question whatever about Mr. Dawson's integrity or professional preparation, but until the Environment and Public Works Committee has completed its work in that area, it would seem prudent that the Armed Services Committee, could without any prejudice whatever, defer for just a few more days——

Senator WARNER. Without objection, that will be done, Senator.

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The Chair now recesses this hearing subject to recall by the Chair, as soon as another witness appears.

[Whereupon, at 9:59 a.m., the committee recessed, to reconvene upon the call of the Chair.]

Whereupon, at 10:10 a.m., the committee reconvened, when were present Senators Warner [presiding], and Nunn.

Also present: Senator Chafee.

Staff present: Alan R. Yuspeh, general counsel; Jeffrey H. Smith, minority counsel; Christine C. Dauth, chief clerk; Marie Chaillet, staff assistant.

Also present. Dale F. Gerry, assistant to Senator Cohen; and Alan Ptak, assistant to Senator Gramm.

Senator WARNER [presiding]. We now have the honor of having the former distinguished Secretary of the Navy.

STATEMENT OF HON. JOHN H. CHAFEE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. Thank you very much, Mr. Chairman. I apologize for the delay I have caused you and members of this committee and the witness, and I appreciate your giving me this time.

Senator WARNER. It has only been minimal, Senator. We only adjourned for a few minutes.

Senator CHAFEE. Mr. Chairman, I have a statement, but first I want to thank you for inviting me and members of the Environment and Public Works Committee to participate in Mr. Dawson's nomination hearing.

As Senator Stafford has pointed out, although our committee does not have jurisdiction over Mr. Dawson's nomination, the committee does have broad jurisdiction over many of the programs he is responsible for administering. One such program is the section 404 Dredge and Fill Program of the Clean Water Act, which is our most important regulatory tool to conserve and protect our Nation's wetlands.

It has been the subject of three oversight hearings conducted by me as chairman of the Subcommittee on Environmental Pollution. A fourth hearing is scheduled for next Wednesday afternoon, and indeed we had it scheduled for last Tuesday, but it was a day that Mr. Dawson was going to be out of town and so we, with mutual agreement, postponed it.

In other words, there has been a delay on this. As you know we had the recess and we had the third day of oversight hearings just before the recess so there is no delay in trying to move ahead with these hearings.

Mr. Chairman, I come here this morning to tell you that we are having these oversight hearings because over the last 3 years charges and allegations have been made by both private organizations and Government officials that the section 404 program is being rendered meaningless through regulatory reform measures, implemented by the Civil Works section under Mr. Dawson's direction.

Our hearings are bearing out these charges and allegations to some degree. It is becoming all to clear to me and other members of the committee that section 404 of the Clean Water Act is not

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being implemented to protect the Nation's wetlands, as we believe Congress intended.

What we have been trying to do in these hearings is not only to find out what has gone wrong with the program, but to try to convince Mr. Dawson to take the necessary steps to assure that appropriate environmental safeguards are put into the program, and we are not alone.

Many of these changes have been continually advocated by EPA and the Fish and Wildlife Service, both partners in administering the 404 program. The 404 program is not solely under the Corps of Engineers, but the EPA and Fish and Wildlife have an input to it.

State and local governments and public interest groups around the Nation have also supported these kinds of changes in the program. Unfortunately, we have yet to see anything concrete come from Mr. Dawson.

Mr. Chairman, I know your interest in wildlife and game and fishing and everything connected therewith. I know you are aware, as I am, of the loss at an incredible rate of these highly valuable resources, the wetlands.

Less than half of the 215 million acres of wetlands that existed at one time in this country exist today. We are losing wetlands at the rate of 300,000 acres per year. What does this mean? It means less habitat for migratory waterfowl and numerous other wildlife species, less habitat for important commercial fisheries, fewer buffers from wave action and erosion, and fewer areas where water supplies can be recharged and purified.

As I indicated, Mr. Chairman, we have invited Mr. Dawson back to our subcommittee next Wednesday with the hope that he may be able to resolve these issues we have identified. Since we are in the midst of these extensive hearings, which we sincerely hope will not have to continue after Wednesday, I would ask that you in your capacity as Chairman postpone reporting Mr. Dawson's nomination until we wrap up our business with him on section 404.

Senator Mitchell, who could not be here this morning, also shares concerns very similar to the ones outlined, and so does Senator Stafford. I want to thank you for this opportunity to discuss my views with the committee.

I would say that I have here a statement of the Bass Anglers Sportsmen's Society, the Environmental Defense Fund, the National Audubon Society and the National Wildlife Federation on the nomination of Mr. Dawson. To summarize, their position is that:

> Our organizations oppose the confirmation of Mr. Robert K. Dawson as Secretary of the Army Civil Works, in the strongest possible terms. We do not make such an unqualified recommendation lightly. For instance, the Federation has never before opposed a President's nominee for an executive agency.

This is obviously a matter of deep concern not just to the Environment and Public Works Committee, but to other organizations as well. In this case, as I say, the Bass Anglers Sportsmen's Society, the Environmental Defense Fund, the National Audubon Society and the National Wildlife Federation.

Mr. Chairman, I would submit this for the record in connection with the hearing.

Senator WARNER. Without objection.

[The information follows:]

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National Audubon Society
950 THIRD AVENUE, NEW YORK, N.Y. 10022 (212) 832-3200 CABLE: NATAUDUBON

Rec'd 9-13-85

September 12, 1985

The Honorable Barry Goldwater
United States Senate
Washington, D.C. 20510

Re: Robert K. Dawson Confirmation

Dear Senator Goldwater:

I am writing this letter on behalf of the National Audubon Society, a nationwide, non-profit conservation organization with over one-half million members. A high priority of Audubon is preservation of the nation's rapidly dwindling wetlands. Throughout its long history, Audubon has actively involved itself in the administration of the wetlands permitting program, found in §404 of the Clean Water Act. We are writing you this letter to ask you not to confirm the nomination of Robert K. Dawson to be Assistant Secretary of the Army (Civil Works) and to make this letter a part of the record of this proceeding.

Section 404, in conjunction with §§301 and 502(b) of the Clean Water Act, provides that no discharge of dredged or fill material may be made into the nation's waters, including wetlands, except pursuant to a permit. Section 404 sets forth the elements of the permitting program and designates the U.S. Army Corps of Engineers as the principal permitting agency. The U.S. Fish and Wildlife Service (FWS) and the Environmental Protection Agency (EPA) also have significant responsibilities under the 404 Program, making it imperative that the three federal agencies work in harmony to achieve the program's preservation goals.

Despite the existence of the 404 Program, the country is losing wetlands at a rate approximating 500,000 acres a year. This is a serious ecological and economic problem, as wetlands serve a variety of critical biological, pollution control, and hydrological functions. This conclusion is well documented in a March 1984 study by the Office of Technology Assessment, "Wetlands: Their Use and Regulation."

Audubon rarely opposes a nominee for federal office. Yet we view with such alarm the pending nomination of Robert K. Dawson to be Assistant Secretary of the Army (Civil Works) with supervisory authority over the administration of the 404 Program, that we feel compelled to speak out in opposition.

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The bill of particulars against Mr. Dawson is lengthy and condemnatory. During his tenure in the Department of the Army he has single-mindedly pursued an agenda dedicated to the destruction of the 404 Program. Let me cite a few examples:

- Mr. Dawson, as Deputy Assistant Secretary of the Army (Civil Works), signed proposed changes to the Corps of Engineer's §404 permitting regulations on May 12, 1983 (48 Fed. Reg. 21466-76), which will effectively deregulate two-thirds of the nation's wetlands, if promulgated in final form.

- Pending revisions to the Corps' regulations implementing the National Environmental Policy Act signed by Mr. Dawson, as Deputy Assistant Secretary of the Army (Civil Works), on January 11, 1984, according to EPA, would have such "unsatisfactory impacts on the quality of the environment" that EPA referred the matter to the Council on Environmental Quality for resolution, under §309 of the Clean Air Act.

- Revised memoranda of agreement with the FWS and EPA, initiated during Mr Dawson's tenure at the Department of the Army, have enabled the Department of the Army to reject repeated requests for further review of natural resource impacts by those agencies in connection with §404 permit applications. Correspondence between former Assistant Secretary of the Interior Department G. Ray Arnett and Mr. Dawson during 1984 indicate the nominee's intransigence about responding to Interior's request that changes be made in those agreements to improve the opportunities for the Interior Department's participation in the review process. As recently as the July 15, 1985 oversight hearings before the Senate Environmental Pollution Subcommittee, Acting Assistant Secretary of Interior Craig Potter testified that the key issues on the agreement were still at "an impasse" with Mr. Dawson.

- During the nominee's tenure at the Department of the Army, the FWS concluded in a 1983 Report for the Lower Mississippi Valley and in a 1984 Report for northern New Jersey, based on a review of permits issued in those regions by the Corps between 1980 and 1984, that there has been a nearly total failure of the §404 Program to provide protection for valuable wetland areas.

- The repeated refusal of the Department of the Army, during Mr. Dawson's tenure, to conduct further review of the fish and wildlife impacts on wetlands affected by the prospective issuance of §404 permits, led former Assistant Secretary of the Interior Department G. Ray Arnett to conclude in a November 7, 1984 letter to the nominee that "Army's regulatory program is so flawed, it is no longer a usable tool to adequately protect wetlands."

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- Despite a sworn affidavit by Mr. Dawson entered in response to plaintiffs' Motion for Partial Breach of Settlement Agreement and Renewed Motion for Partial Summary Judgment, in National Wildlife Federation v. Marsh, U.S. District Court for the District of Columbia, Docket No. 82-3632, in which the nominee alleged that a definition of the term "fill" would be promulgated by the Corps in cooperation with EPA by May 15, 1985 (a year beyond what the original agreement required), no definition has been published to date. In partial reliance on that affidavit, plaintiffs dismissed their motion.

These are but a few illustrations of what Mr. Dawson has done or attempted to do to the 404 Program.

The Armed Services Committee is being asked to confirm a nominee who does not believe in the program he will then administer, and who, even today, after judicial opinions and legislative action confirm the intent of Congress to protect the nation's wetlands in the most expansive way consistent with Constitutional limitations found in the commerce clause, challenges the jurisdictional reach and intent of that program.

We ask you, in the interest of protecting these critical natural resources, to reject Mr. Dawson's nomination. At minimum, we ask that you delay action on Mr. Dawson's nomination until the Senate Environmental Pollution Subcommittee completes its oversight hearings on the nominee's administration of the 404 Program and issues its report. We realize the seriousness of these requests, but would not make them if we did not consider Mr. Dawson's confirmation to be a serious threat to wetlands protection.

Sincerely yours,

Peter A. A. Berle
President

cc: The Hon. John Chafee
The Hon. Strom Thurmond
The Hon. John W. Warner
The Hon. Gordon J. Humphrey
The Hon. John P. East
The Hon. William S. Cohen
The Hon. Dan Quayle
The Hon. Pete Wilson
The Hon. Jeremiah A. Denton, Jr.
The Hon. Phil Gramm
The Hon. John C. Stennis
The Hon. Sam Nunn
The Hon. Gary Hart
The Hon. Edward M. Kennedy
The Hon. Jeff Bingaman
The Hon. John H. Glenn, Jr.
The Hon. J. James Exon
The Hon. Carl Levin
The Hon. Alan J. Dixon

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NATIONAL WILDLIFE FEDERATION, 1412 Sixteenth Street, N.W., Washington, D.C. 20036 (202) 797-6800
Office of the Executive Vice President

September 13, 1985

The Honorable Barry Goldwater, Chairman
Senate Committee on Armed Services
222 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

On behalf of the Bass Anglers Sportsman Society, the Environmental Defense Fund, the National Audubon Society, and the National Wildlife Federation, I am submitting the enclosed statement on the confirmation of Mr. Robert K. Dawson as Assistant Secretary of the Army (Civil Works) and ask that it and the supporting documentation be made a part of the Committee on Armed Services' written record on this nomination.

The record of Mr. Dawson's performance over the past four and a half years demonstrates fundamental opposition to the protection of wetlands under Section 404 of the Clean Water Act, a law that is intended to protect wetlands and a law that he is sworn to uphold. Moreover, as our statement demonstrates, his opposition to these Clean Water Act goals has been seriously at odds with the other key officials in this Administration charged with similar responsibilities and has produced unprecedented levels of confrontation with the State and Federal agencies which share a congressionally-mandated role in the Section 404 program.

For these reasons our organizations urge you and other members of the Committee on Armed Services to vote in opposition to the confirmation of Mr. Robert K. Dawson as Assistant Secretary of the Army (Civil Works).

Thank you for your consideration of our request.

Sincerely,

Jay D. Hair

JAY D. HAIR

cc: Committee on Armed Services

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NATIONAL WILDLIFE FEDERATION
1412 Sixteenth Street, N.W., Washington, D.C. 20036 202—797-6800

STATEMENT OF THE
BASS ANGLERS SPORTSMAN SOCIETY,
ENVIRONMENTAL DEFENSE FUND,
NATIONAL AUDUBON SOCIETY
AND
NATIONAL WILDLIFE FEDERATION

ON THE NOMINATION OF
ROBERT K. DAWSON
AS
ASSISTANT SECRETARY OF THE ARMY
(Civil Works)

SUBMITTED TO THE
SENATE COMMITTEE ON ARMED SERVICES

September 12, 1985

Prepared by:
Robert P. Davison, Ph.D.
Fisheries and Wildlife Division
National Wildlife Federation

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Mr. Chairman and Members of the Committee, the Bass Anglers Sportsman Society, Environmental Defense Fund, National Audubon Society and National Wildlife Federation present the following statement on the nomination of Mr. Robert K. Dawson for the position of Assistant Secretary of the Army for Civil Works.

Our organizations believe in the wise utilization of our nation's natural resources. Conservation of wetlands has been a particularly high priority of our members because of the vital role these areas play in the survival of many species of fish, wildlife, and shellfish and because of their importance in improving water quality, performing waste treatment, reducing the effects of floods and storms, and recharging underground water supplies. Recent estimates by the U.S. Fish and Wildlife Service (FWS) and the Office of Technology Assessment have underscored greatly the need for more effective conservation of the nation's remaining wetlands.

As Deputy Assistant Secretary of the Army (Civil Works) from May 1981 to May 1984 and then Acting Assistant Secretary (Civil Works) to the present time, Mr. Dawson has been largely responsible for the Army Corps of Engineers' implementation of Section 404 of the Clean Water Act, which is this nation's principal tool for conserving wetlands. The importance of the Section 404 program to the natural resources of our country and the role Mr. Dawson has played in shaping this program over the past four and a half years compel us to come forward today to present this statement. It is without precedent in the history of the National Wildlife Federation.

. Our Position on Confirmation of Mr. Dawson

Our organizations oppose the confirmation of Mr. Robert K. Dawson as Assistant Secretary of the Army (Civil Works) in the strongest possible terms. We do not make such an unqualified recommendation

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lightly. For instance, the Federation has never before opposed a President's nominee for an executive agency. However, in Mr. Dawson's case there is a long substantive record available by which to judge his performance and commitment in implementing Section 404 of the Clean Water Act. Additionally, a number of the more troubling aspects of Mr. Dawson's record have been the subject of no less than three oversight hearings by the Senate Committee on Environment and Public Works. A fourth such hearing is scheduled for next week. This record shows that Mr. Dawson has an overt hostility to protection of wetlands under Section 404, a law that in fact is intended to protect wetlands and a law that he is sworn to uphold. For this reason our organizations oppose Mr. Dawson's nomination as the primary supervisor of the Army Corps of Engineers.

For example, Mr. Dawson presented written testimony and stated in oversight hearings on May 21, 1985 that:

- "One significant point to recall is that the Congress did not design Section 404 to be a wetland protection mechanism and it does not function well in that capacity." [1]

- "...404 is a poor mechanism to protect wetlands." [2]

- "The Congress has never addressed the issue of wetlands jurisdiction . . . We believe the issue of wetland jurisdiction of the CWA demands appropriate legislative direction." [1]

These statements are inimical to the congressionally-identified goals of this key provision of the Clean Water Act, and they are at odds with the positions taken by the leadership of the Senate Environment Committee, which has jurisdiction over Section 404. Consider these responses by Senators John H. Chafee and Robert T. Stafford on June 10, 1985 to Mr. Dawson's testimony:

> Senator Chafee: "Well, I don't know who told you that, Mr. Dawson, but you ought to read the legislative history of the 1977 Clean Water Act amendments. You can start on page 644

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of the Senate volume, which reads, and I quote to you, . . . 'The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of Section 404 has attempted to achieve.'" [3]

Senator Stafford: "My concern over this issue has been increased considerably by the testimony at the May 21st hearing that was given by Robert Dawson, the Acting Assistant Secretary of the Army for Civil Works, the civilian arm of the Corps of Engineers. I know Mr. Dawson disagrees, but as one Member of the Congress who has had more than a passing interest in the Clean Water Act of 1972 and 1977, I can assure Mr. Dawson that it was the intent of the Congress that wetlands are important and are to be protected under Section 404 of the Clean Water Act. For an agency as important to this task as the civilian arm of the Army Corps of Engineers to hold otherwise is to frustrate the very goals of the Act." [3]

With regard to Mr. Dawson's position that "Congress has never addressed the issue of wetlands jurisdiction," the Justice Department of this Administration has stated in its brief before the Supreme Court that the "conclusion that it is 'not clear' that Congress wanted the Corps to exercise the broadest possible jurisdiction over the Nation's wetlands is simply untenable when examined in light of the legislative history." [4]

If there is any uncertainty that may exist over what waters are protected by Section 404 it is because of the statements and regulatory changes made by Mr. Dawson and others in the office of the Assistant Secretary. The Corps' Wilmington District Engineer said it best, "The prevailing uncertainty over jurisdictional extent of the law is perhaps one of our own making because of our seeking, through nationwide permits and other means, a justification for limiting the jurisdiction of the Clean Water Act to some boundary less than the full breadth of the wetlands found in the term 'all waters of the United States'." [5]

The Dawson Record

Mr. Dawson's positions regarding the Section 404 program not only are diametrically opposed to those of the leadership of the

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Environment and Public Works Committee and the Justice Department, they also have produced nearly continuous confrontation over the past four years with the Department of the Interior and the Environmental Protection Agency, as well as with many, and at times a majority, of the state fish and wildlife, natural resource and environmental protection agencies. Moreover, in the three hearings to date before the Senate Environment and Public Works Committee, Mr. Dawson has demonstrated a nearly complete intransigence toward problems in his administration of the Section 404 program that have been identified by the Committee, the Department of the Interior, and the Environmental Protection Agency. This refusal of Mr. Dawson to veer from his own, one-sided regulatory reform agenda regardless of its impact on the environment or its legal validity, has forced the Senate Environment Committee to schedule a fourth hearing on September 18 and to pledge that "We are just going to stick with this until we get these matters settled, . . . and get this program doing something." [3] The remainder of this statement documents the Dawson record and the adverse environmental effects of his approach to regulating activities in wetlands and other waters.

Mr. Dawson Attempted To Eliminate The Wetland Protection Keystone Of Section 404

By law the Corps of Engineers shares with the Environmental Protection Agency the responsibility for protecting wetlands. Section 404(b)(1) prohibits the Corps from issuing permits for wetlands fills except in compliance with regulations promulgated by EPA. Section 404(c) authorizes EPA to prohibit any discharge site if the fill will have an unacceptable adverse effect on water supplies, fisheries, wildlife, or recreational areas. Notwithstanding express congressional intent that EPA play a major role in the 404 program, Mr. Dawson has continually attempted to shunt EPA aside in this zeal to grant permits.

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In November 1982, then Deputy Assistant Secretary Dawson wrote EPA Assistant Administrator Eric Eidsness with his request that EPA's Section 404 environmental regulations be relegated to an advisory status so that the Corps would no longer be bound by EPA's requirements in making decisions on permit applications. Such a change would greatly diminish EPA's role in the 404 program and relieve the Corps of having to insure that proposed projects satisfy objective environmental criteria. But Mr. Dawson did not stop with that sweeping request. He went on to request deletion of the presumption that upland sites are available for non-water dependent activities -- the operational heart of EPA's regulations -- and more:

- "Section 230.10(a)(3) states that upland alternatives are presumed to be available for non-water dependent activities. Because of the serious disputes about the meaning of the term and the absence of statutory support, the presumption should be dropped."

- "That same section contains another presumption that discharges at upland sites have less adverse impacts than discharges in aquatic ecosystems. This presumption carries with it substantial risk that objective review would be jeopardized....Absent a statutory requirement, imposing such presumptions goes well beyond the principles of good government..."

- "We can see no justification, for example, to include definitions which appear more appropriately in Army regulations, nor to include the presumptions noted in 2. above, mitigation policy, nor policy on examination of alternatives." [6]

Simply put, Mr. Dawson argued for abolishing the key test in Section 404 permit evaluations which prohibits the unnecessary destruction or alteration of wetlands where practicable alternative sites are available or where the project need not be located in a wetland to meet its objectives (i.e., is not 'water dependent'). For example, the construction of a marina is water dependent, whereas the construction of a shopping mall is not. The immense value of wetlands and the stunning rate at which these

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resources are being destroyed certainly justify the presumption against development in wetlands. Further, private investors, aware of the presumption and difficulty it would cause in securing a Section 404 permit for certain projects that are not water dependent, have sought alternative sites. Thus, the present EPA environmental guidelines have influenced expectations. Changes in the guidelines, such as those recommended by Mr. Dawson, would alter those expectations and could undo the long-term protection of wetlands.

Nevertheless, Mr. Dawson, undaunted, continues his attack on the water dependency test, testifying on May 21, 1985 that this fundamental precept of the Section 404 program "for the most part, serves little purpose in the analysis of an application under Section 404. It often confuses the issues rather than promotes an objective analysis." [2]

Senator Stafford took strong exception to this in his Committee's hearing on June 10, 1985:

> "I also want to say, again in disagreement with Mr. Dawson, that it is the opinion of this Senator that the water dependency test is the keystone to the goal of preventing unnecessary destruction of wetlands. It serves an important purpose in the analysis of Section 404 permit applications. It is my view, for instance, that we should not be making it easier to fill wetlands for clearly non-water dependent purposes, such as construction of shopping malls." [3]

Attleboro Mall: A Different Way To Dismantle EPA's Environmental Regulations

Unsuccessful at getting EPA to eviscerate its own environmental regulations, Mr. Dawson instead has supervised the re-interpretation of those regulations by the Corps of Engineers in the context of a specific permit application to build a mall in 30 acres of wetlands near Attleboro, Massachusetts.

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Mr. Dawson met with the attorneys for the mall developer on July 10, 1984 and assured them that, unless new issues were raised, 70 days would be a reasonable time in which to expect approval of their permit application. In April 1985, Mr. Dawson met with the Massachusetts Association of Conservation Commissions and others to discuss the pending permit application for Attleboro Mall. A month later the Corps' New England Division Engineer decided that the Attleboro Mall permit should be denied because it was not water dependent and a viable, alternative upland site was available only three miles away. But before a final decision was made, Corps officials in Washington made the extremely rare request on April 24 to review the permit application. On May 31 the New England Division Engineer was directed to "reconcile your documentation with the guidance" from Washington and issue the permit, primarily because of the applicant's pledge to build a "repalacement" wetlands somewhere else. [7]

Although Mr. Dawson was involved in at least two meetings concerning the Attleboro Mall permit application prior to April 24, he told Senator Chafee that "it was not my decision to call the matter forward, nor did I call it to my office to make the decision." [3] Given his prior involvement with the Attleboro Mall application, Mr. Dawson's attempt to separate himself from the decision to issue the permit strains his credibility. Indeed, it seems hard to believe that the Acting Assistant Secretary would trouble himself over the amount of time a permit application would take and not over the ultimate decision on the application.

The decision to issue the permit by Corps headquarters was based on the rationale that the applicant's offer of mitigation did away with the need to comply with the presumption in EPA's regulations that practicable alternatives for non-water dependent projects such as shopping malls are available unless clearly demonstrated

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otherwise. A study contracted by the New England Division Engineer demonstrated that such an alternative did exist. Instead the Attleboro Mall developers were allowed, in effect, to purchase an exemption from the requirements of EPA's environmental guidelines -- a result remarkably consistent with Mr. Dawson's earlier recommendation that such requirements be dropped from the guidelines. In fact, to ignore the water dependency test and grant a permit based on a pledge to build a replacement wetland would turn Section 404 from a wetland protection statute into a wetland removal statute.

Once again Mr. Dawson's decision or, at the very least, his concurrence with the decision by Corps headquarters, is seriously at odds with the other federal agencies involved in the Section 404 program and the Senate Environment Committee. EPA has initiated action under 404(c) to decide whether to prohibit or restrict development of the mall, stating that the adverse impacts from the project are "unacceptable because they are avoidable." [8] EPA has initiated only eight such actions since 1972.

Senator Gordon J. Humphrey wrote in support of EPA's action on Attleboro Mall, stating that:

> "It is my view that Section 404 stands at the center of our national effort to preserve and protect some of our most valuable natural resources. As such it should be administered with those objectives in mind. However, it has become apparent that the Army Corps of Engineers has been less than committed to these important objectives....**In the case of Attleboro mall...I find it particularly disturbing that this decision was made by the Washington headquarters, and that the decision was in direct conflict with the recommendations made by the Corps' New England Division....** If we continue to issue permits for projects that threaten such needless destruction of wetlands and for which practical alternatives exist, then how long will it be before the nation's remaining wetland resources are all paved over for shopping malls, real estate development and highways? How many more Attleboro's or Westway's will there be? [9]

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Craig Potter, former Acting Assistant Secretary of the Interior told the Senate Environment Committee on July 15, 1985 that "the Corps has said, water dependency aside, we believe you can mitigate fully to replace this marshland...The policy in past has been you wouldn't even address that issue if you didn't have a water dependent activity...The Fish and Wildlife Service's feeling is that a shopping mall is not a water dependent activity." [10]

Senator Chafee told Mr. Dawson on June 10 that a new precedent was being set by allowing this project to use "mitigation rather than the alternative site, even though it is not water dependent...I think we are getting off on a whole new dangerous road here." [3]

Mr. Dawson's Proposed Assault On The Corps' Section 404 Regulations

Mr. Dawson personally approved proposed regulatory changes in how the Corps regulates dredged or fill discharge activities in the nation's wetlands and other waters under Section 404 of the Clean Water Act. The proposed rules were published May 12, 1983 (48 Fed. Reg. 21466-21476).

Under the guise of seeking enhanced procedural efficiency, the Dawson proposal instead was an attempt at a major weakening and dismantling of the Section 404 program. The proposed rules were opposed strongly by 39 agencies in 33 states, the Environmental Protection Agency, virtually every major national conservation organization, many state and local organizations, professional organizations such as The Wildlife Society and American Fisheries Society, and more than 1,000 concerned scientists. The proposed rules, which may still be finalized, would:

1. Define terms within the definition of wetlands so that approximately two-thirds of the wetlands in the lower 48 states,

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or more than 60 million acres, currently protected by Section 404 -- e.g. bottomland hardwoods, shrub bogs, pocosins and others -- would no longer be protected.

2. Strip the states of their ultimate authority to prevent the issuance of general permits that adversely affect the quality of waters within the state or that are inconsistent with state coastal zone management plans.

3. Distort permit review criteria by inserting inappropriate environmental criteria. For example, the proposal would presume, merely because a permit application is filed, that there is an economic need for the project.

4. Encourage the shortening of the public comment period on permit applications from 30 to 15 days and scrap the requirement that Corps' public notices of such applications alert the public of its right to request a public hearing.

But you don't have to take our word for the devastating impact that Mr. Dawson's regulations would have on the wetland protection and public participation provisions of Section 404. Senator John Heinz wrote Vice President Bush in September 1983 that

> "Among many questionable ideas, the Corps has proposed to define "wetlands" in a way that would entirely remove from federal oversight botcomland hardwoods, much tundra, and wetlands across the nation in the upper levels of floodplains. The Corps also would insert a host of new criteria into permit review that appear to promote development at the expense of environmental protection." [11]

Or consider this small sampling of what EPA and the 39 agencies in 33 states had to say:

> North Dakota -- "We particularly reject your facade of regulatory relief. Plain and simple, what you propose is the removal of necessary environmental safeguards for America's aquatic resources. This is particularly cruel because it comes at a time when the Supreme Court of the United States has declared our wetlands 'a national treasure of nearly the highest magnitude'." (Dale L. Henegar, Commissioner, North Dakota Game and Fish Department)

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Ohio -- "...the overall effect of the proposed changes will be a serious weakening of the protection for the biological and chemical integrity of the nation's waters. The proposed changes would also constitute a breach of the statutory requirements of the Clean Water Act." (Ohio Department of Natural Resources)

Indiana -- "It seems grossly inconsistent that the administration in Washington is strongly advocating wetland preservation, while the U.S. Army Corps of Engineers is attempting to abolish one of the most effective methods of wetlands protection... The Assistant Secretary's proposal would "hamstring" the major protective measures intended to be utilized for the best public interest." (Edward L. Hansen, Director, Indiana Division of Fish and Wildlife)

Georgia -- "...the proposed changes will negatively impact fish and wildlife resources in Georgia... the proposed regulatory reforms have gone beyond the point at which they can continue to adequately protect fish and wildlife resources." (Georgia Office of Planning and Budget)

Massachusetts -- "The Commonwealth of Massachusetts continues to be opposed to the apparent trend, reflected by the COE proposed regulations, toward the weakening and reduction of protection for the nation's wetlands ...the newest revisions...will accelerate the loss of wetlands not only in Massachusetts but nationwide." (Massachusetts Executive Office of Environmental Affairs)

Illinois -- "...the changes being proposed...will seriously weaken the regulatory program...and reduce the protection currently being afforded the streams and wetlands of Illinois." (Illinois Department of Conservation)

Michigan -- "The State of Michigan has and continues to object to the arbitrary actions of the Corps in considering that the state has waived certification requirements under federal statute based on promulgated rules." (Michigan Department of Natural Resources)

California -- "The proposed definition is incomplete in terms of meeting the letter and intent of the CWA.... Considerable areas of forested bottomland swamps, tundra, etc. would no longer be considered wetlands." (Don Lollock, California Department of Fish and Game)

Environmental Protection Agency -- "As currently proposed EPA believes this regulation would have environmentally unacceptable results... Because the definitions contained in [the proposed regulation] determine the scope of jurisdiction

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> of the Section 404 program and were proposed without our concurrence, these changes are inconsistent with the legal opinion of the Attorney General.'

Despite the strong and widespread opposition to Mr. Dawson's proposed revisions to the Section 404 program, these regulations have not been withdrawn, and Mr. Dawson continues to maintain that some unspecified version of the proposal will still be finalized later this year.

The disastrous May 12, 1983 proposal wasn't the first time Mr.Dawson had provoked a confrontation with EPA, Interior, and the states. In 1982, he was involved in finalizing regulatory changes to the program that were opposed by Interior and EPA. Unfortunately, these agencies had only three days to review the final regulatory package before it went into effect. The adverse impacts of those regulations and Army's nearly complete disregard for the views of the other federal agencies involved in Section 404, prompted Senator Chafee to hold a hearing on July 16, 1982. Senator Chafee concluded that hearing with a strong admonishment to Mr. Dawson:

> "You come in with a crusader spirit, Mr. Dawson, and Mr. Gianelli, your boss, in making it easier, quicker to get these permits. That is not the purpose of the program. The purpose of the program is to save the wetlands in the country. It is not to get permits as fast as you can get them. Sometimes these permits cannot be acquired, processed as quickly as possible. I notice, I think what you say, 60 to 70 days average for the noncontested permit, maybe that can be speeded up, but the objective is to preserve the wetlands of the country. That is the purpose of the Act." [12].

Apparently, Mr. Dawson wasn't listening.

Mr. Dawson's Refusal to Revise Army's Memoranda of Agreement with Interior and EPA

Although the Army has primary day-to-day responsibility for the 404 program, Interior (FWS), Commerce (National Marine Fisheries

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Service), and EPA also review 404 permit applications. Disagreement between these agencies and Army over the resource impacts of a permit may result in elevation of a permit to higher administrative levels within the Army for additional review. However, in 1982 Army and Interior, Commerce and EPA signed new Memoranda of Agreement (MOA) that greatly restricted the review agencies ability to protect fish and wildlife and water quality through additional permit review. Since the new agreement was signed, the Army has refused the majority of the requests by the federal resource agencies to elevate disputes to higher level officials.

Former Assistant Interior Secretary G. Ray Arnett has been a vocal and harsh critic of the MOA which has been in effect between Army and Interior since July of 1982. EPA, under William Ruckelshaus and Lee Thomas, was so dissatisfied with its MOA with Army that EPA terminated it, an option Interior did not have in their agreement. Mr. Dawson, on the other hand has been a staunch supporter of the 1982 MOA with Interior and EPA and an insurmountable obstacle preventing revisions to provide adequate protection for the aquatic environment. For those who might question such a conclusory statement, we offer the following record of correspondence by Mr. Arnett, various EPA officials and Mr. Dawson (emphasis added):

> Arnett to Dawson (May 9, 1984): "While the district engineer may elect to issue a permit in spite of Service-documented losses, while stating his reasons for doing so, **we do not believe it is within his authority to contradict our biological findings and use this contradiction to help justify his decision.** This is an erroneous exercise in logic resulting in a flawed decision, and, if used in the future, will cause continued and needless resource losses." [13]
>
> Dawson response (June 1, 1984): "Your agency's disagreement with the adequacy of that determination is a technical evaluation matter and is not a basis for elevating the decision under our 1982 Memorandum of Agreement (MOA)." [14]

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Arnett to Dawson (August 10, 1984): "I am also disappointed that the changes I recommended in the MOA have been interpreted as contrary to the guidance of the Presidential Task Force Report on Regulatory Relief....**I believe that environmental protection is deteriorating because of the deficiencies in the current MOA** and fear that you are following the Task Force recommendations without recognizing their dual goals....I believe that the elevation requests have been eminently reasonable and justifiable, and are intended to protect the public interest in the fish and wildlife resources in question. **Yet, half of the elevation requests were summarily refused** by your agency. An elevation simply means the District Engineer's decision will be reviewed, not necessarily changed. Propriety, alone, would dictate your honoring my requests. **I know of no other instance wherein a simple request of one department official to another is so perfunctorily denied.**" [15]

Dawson response (August 30, 1984): "However, **in the absence of a better indication of environmental harm**, we would be reluctant and I think ill-advised to make significant changes to **an effective agreement**, one which has provided the regulated public much more responsive government." [16]

Arnett to Dawson (October 2, 1984): "Bob, **the occurrence of so many individual projects where the Service has similar concerns** points out the need to review the Corps' environmental documentation and mitigation policies and their implementation....The Service has special expertise in these areas and **its recommendations should not be arbitrarily rejected without cause.**" [17]

Dawson response (October 18, 1984): "**The first issue you raise as a policy matter is that of adequate documentation. I am unaware that such a consideration is within the area of expertise of the FWS** or even that it is subject to policy discussions....Additionally, as in the discussion of your first issue, adequacy of documentation is not a policy matter, it is established through regulation, and writing an SOF [Statement Of Finding] is not an area of expertise of FWS." [18]

Arnett to Dawson (November 7, 1984): "For nearly two and a half years, our Departments have been involved in an exchange of views relative to the Department of the Army's (Army) implementation of our interdepartmental Memorandum of Agreement (MOA). **It is now abundantly clear that further correspondence on this issue is pointless and that Army's regulatory program is so flawed it is no longer a useable tool to adequately protect wetlands.**

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"Furthermore, of the 23 permits for which elevation was requested but rejected by Army, four have resulted in lawsuits and four have resulted in Section 404(c) actions based on environmental grounds. This hardly results in a streamlined, timely, or predictable regulatory program, and these were primary goals of the Vice President's regulatory relief efforts." [19]

Dawson response: None

Arnett to Dawson (December 17, 1984): "Your letter [October 18, 1984] essentially "brushes off" the concerns that I believe were carefully documented in my letter, and this is symptomatic of the lack of agreement we have regarding the procedures outlined in the 1982 indepartmental Memorandum of Agreement."

"I disagree with your findings concerning all of the major points that were addressed in my letter of October 2, 1984. ...Regarding the issue of insufficient coordination, your response appears to contravene the intent of the Fish and Wildlife Coordination Act (FWCA)....Your assertion that environmental documentation is not an area of expertise of the Service astounds me, and I refer you again to the FWCA."

Furthermore, I cannot believe that you would condone sloppy decisionmaking or the "shortchanging" of commenting agencies by allowing such pitiful examples of decision documentation to see the light of day...Will you kindly review this letter and my letter of October 2, and provide a response that is "on target"?" [20]

Dawson response: None

Five months later before the Senate Environment Committee in May 1985, Mr. Dawson remained steadfast in his refusal to revise the principal flaws in the MOA with Interior. Former Assistant Interior Secretary Arnett returned to testify at that hearing that the present MOA "prevented adequate protection of the environment." [2] Two months later on July 15, 1985 in the third oversight hearing on Section 404, Acting Assistant Interior Secretary Craig Potter reported that on the key MOA issues they were still at "an impasse" with Mr. Dawson. [10]

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Mr. Arnett and Mr. Potter are not alone in their belief that the MOA championed by Mr. Dawson must be revised. Former **Interior Secretary William Clark** wrote Mr. J. Ron Brinson, President of the American Association of Port Authorities that "the 1982 MOA has resulted in a thirteenfold increase in elevations of permit decisions. Under the 1980 MOA, only 1.3 cases per year required resolution at the Washington Office level, while in the first year of the 1982 agreement, 15 cases required action by both Assistant Secretaries. **My wish is that changes in the MOA will bring environmental protection into balance with regulatory relief.**" (emphasis added) [21]

EPA Deputy Regional Administrator, Region I, wrote Assistant Administrator for External Affairs, Josephine Cooper, in December 1983 that "The Army interpretation of the MOA is unreasonable and counterproductive." [22] EPA's Region V Water Division Director, Charles Sutfin, wrote his Deputy Regional Administrator that same month that "It could be argued that the 404(q) MOA is designed in such a manner as to preclude the USEPA from having any meaningful involvement in the 404 permit program. Its restrictions on review times, extensions of comment periods, and the scope of the USEPA's review of proposed projects are unwarranted and detrimental to the goals and objectives of the Clean Water Act." [23] One year later EPA terminated its MOA with Army after unsuccessfully seeking revisions from Mr. Dawson.

At the May 21, 1985 hearing before the Senate Environment Committee, Ms. Cooper testified for EPA that "We have been negotiating with the Army since the memorandum lapsed on December 1, 1984 but have not yet reached agreement." [2] Two months later at the July 15 hearing Mr. Richard Sanderson, Acting Assistant Administrator for External Affairs, like Mr. Potter, testified that EPA also had "not been able to find an area of agreement" with Mr. Dawson on the two key MOA issues. [10]

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Through all of the lengthy dispute over the MOA, Mr. Dawson has maintained that Interior Secretary Clark, Assistant Interior Secretaries Arnett and Potter, EPA Administrators Ruckelshaus and Thomas, and Senators Chafee, Stafford, and Mitchell are wrong in their assessment that the present MOA must be revised to provide adequate environmental protection. The controversy surrounding the MOA is their fault, not his. They have prevented a resolution of the conflict, not him.

We find that contention absurd and revealing about Mr. Dawson's ability to work with other Administration officials in a multi-agency environmental program like Section 404.

In contrast to the Clean Water Act's express prohibition of unpermitted discharges of all fill material in waters of the United States, Mr. Dawson refuses to revise Army's definition of fill material which exempts discharges of fill that are accidental or that are "primarily to dispose of waste." Mr. Dawson contends that such fills should be regulated under Section 402 of the Clean Water Act and the NPDES program for effluent limitations. Nothing in the Clean Water Act indicates a congressional intent to exclude such discharges from Section 404 regulation and, in fact, the Army definition is in violation of the plain language of Section 404(a) and as such is invalid. Yet the only reason Mr. Dawson offered at the June 10 oversight hearing before the Senate Environment Committee for refusing to modify Army's limited definition of fill material was "we feel we have the expertise to deal with the fill question when that is the primary purpose." However, Mr. Dawson did concede that "it is not always easy to say what that primary purpose is and what may be an initial primary purpose may evolve into some other purpose later on." [3]

Mr. Dawson's contention that solid waste fills are regulated under Section 402 is belied by Assistant Administrator Cooper's

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insistence that EPA's "position has been consistently that fill should be regulated under Section 404, whatever the purpose of that fill." [3] EPA maintains that Mr. Dawson's "primary purpose" test is unworkable administratively because the "primary purpose" in any given situation may be unidentifiable. In addition, the test makes no sense because adverse environmental impacts from a fill are unrelated to the discharger's intent and therefore the line drawn by Mr. Dawson is arbitrary.

Mr. Dawson inherited this dispute over solid waste disposals in wetlands and other waters, but he has presided over Army's continued refusal to regulate these discharges for the past four and a half years and they remain largely unregulated to this day. Moreover, in a sworn statement in U.S. District Court dated June 1984, Mr. Dawson stated that Army and EPA would publish a joint definition of fill material in May 1985. No such definition has appeared and on July 15, 1985 Mr. Dawson told Senators Chafee and Mitchell that a proposed definition would not be available until January 1986. In the meantime, Army, under Mr. Dawson's direction, steadfastly refuses to regulate discharges of fill material where the primary purpose is to dispose of waste.

Mr. Dawson's Jurisdictional Deregulation of Isolated Wetlands

Thirteen years after passage of Section 404, ten years after the landmark court decision in NRDC v. Callaway, and eight years after Congress expressly stated that Section 404 applies to wetlands without limitation, Mr. Dawson, as noted at the beginning of this statement, maintains that the limit of Army's jurisdiction over wetlands is unclear. Mr. Dawson invokes this supposed jurisdictional uncertainty as a means of avoiding regulation of wetlands filling. On June 10, 1985, Senator George Mitchell told Mr. Dawson, "the Corps has taken what can only be described as an

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increasingly narrow view of its jurisdiction in this area and has adopted what I think are policies that are clearly inconsistent with the law. ...failure to assert jurisdiction in repeated instances in which it may exist, in which I believe and others believe it does exist, is certainly narrowing of jurisdiction." [3]

One area which Mr. Dawson apparently has found particularly fertile for this type of jurisdictional deregulation is the protection of isolated wetlands. Under Section 404, the jurisdiction over such waters extends to the furthest extent of the Commerce Clause in the Constitution (the basis for virtually all federal regulatory statutes). The Supreme Court has reviewed scores of federal statutes to determine if they exceed Congress' power under the Commerce Clause and has **never** invalidated a statute in the last 50 years on such a ground. Moreover, **every** court but one has concluded that Congress intended in the Clean Water Act to assert federal jurisdiction over the nation's waters to the full extent of its constitutional power. The one exception is now before the Supreme Court, where the Justice Department of this Administration, as noted earlier, argues that any contention that "it is 'not clear' that Congress wanted the Corps to exercise the broadest possible jurisdiction over the Nation's wetlands is simply untenable..." [4]

Yet, Mr. Dawson told Senator Mitchell and other members of the Senate Environment Committee on June 10, 1985 that "[t]he problem, Senator, of what constitutes interstate commerce...is a very difficult legal definition." [3] An April 8, 1985 letter from Mr. Dawson to Senator Chafee maintains that "judicial rulings vary widely" on what constitutes interstate commerce. [24] This completely unsupported statement by Mr. Dawson generated this response by Senator Chafee on June 10, 1985, "I don't know at all that judicial rulings vary widely. I think they are consistent...

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You show me a case that has ever been won on the other side." [3] Mr. Dawson could not provide any.

At the third oversight hearing on July 15, 1985, Mr. Dawson was as uncertain as ever about whether Army's jurisdiction extended to isolated wetlands. His continuing doubts brought this strong rebuke from Senator Mitchell,

> "I just want to make this point, Mr. Dawson, which I made at the previous hearing. **You are required by law to administrate and enforce the law.** The only thing you have now in this area is a clear expression of Congressional intent to exercise jurisdiction under the commerce clause to the fullest extent permitted by law. Any reading of the background of this must inevitably lead to the conclusion that you should ascertain and implement jurisdiction over isolated wetlands for the reasons that have emerged during this question and answer period and the previous one. I think you have to do that. That is incumbent on any public official who has to enforce the law. **You may disagree with it...but you can't leave it up to every individual person implementing the law to decide whether it makes sense or is practical; whether it can or can't be done. In our system, that is a legislative determination. The legislature in this area has spoken.**" [10]

Mr. Dawson remains unconvinced that he is required to implement the law and assert jurisdiction consistently over isolated wetlands. He has so far refused requests by the Senate Environment Committee to provide guidance to field personnel on how to determine interstate commerce jurisdiction over isolated wetlands, leaving 37 Corps districts to decide what the U.S. Constitution means.

Mr. Dawson's Refusal To Amend His Environmentally Harmful NEPA Regulatory Proposal

As Deputy Assistant Secretary, Mr. Dawson signed proposed regulations to abbreviate substantially the Corps' NEPA

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regulations. Far from reorganizing and simplifying existing regulations, Mr. Dawson's proposal cuts back on the substantive law contained in the current regulations in such a way that will lead to more controversy, confusion, and litigation in the long run. Moreover, Mr. Dawson failed to demonstrate and document any need for a revision in the first place. EPA went so far as to request the Council on Environmental Quality (CEQ) to review the proposed regulations. On February 25, 1985, EPA Administrator Lee Thomas wrote the CEQ that "EPA's efforts to resolve our concerns with the Department of the Army have not proven successful...that major problems remain, and that the regulation would have unsatisfactory impacts on the quality of the environment." Administrator Thomas added that "these revisions would have an adverse effect on EPA's program to review significant environmental impacts of proposed Federal actions under Section 309 CAA [Clean Air Act], and to prevent unacceptable adverse effects of dredge and fill discharges under Section 404 of the Clean Water Act (CWA). We believe these changes would increase the likelihood of coordination problems between EPA and the Corps." [25]

Mr. Dawson's response to this review by CEQ, like his response to the regulation of solid waste and problems with the MOA, has been to stall. He has requested four extensions of time to date to respond to EPA's criticisms of his regulatory proposal. The latest extension gives Mr. Dawson until September 30, 1985. Is Mr. Dawson waiting to be confirmed before he responds?

Conclusion

The Assistant Secretary of the Army (Civil Works) is a key figure in this nation's efforts to conserve our valuable wetland resources. Mr. Dawson has shown himself unwilling to administer and enforce the laws governing his agency.

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The record of his performance over the past four and a half years demonstrates fundamental opposition to the goals of the Clean Water Act. His positions on wetland protection under Section 404 have been at odds with the other key officials in this Administration charged with similar responsibilities. He has succeeded only in producing unprecedented levels of confrontation with the state and federal agencies which share a role in the Section 404 program.

Consequently, the Bass Anglers Sportsman Society, Environmental Defense Fund, National Audubon Society and National Wildlife Federation urge this Committee to vote in opposition to the confirmation of Mr. Robert K. Dawson as Assistant Secretary of the Army (Civil Works).

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List of Exhibits

1. Testimony of Robert K. Dawson, Acting Assistant Secretary of the Army (Civil Works), before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, May 20, 1985.

2. Hearings before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, May 21, 1985.

3. Hearings before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, June 10, 1985.

4. U.S. Brief before the Supreme Court in U.S. v. Riverside Bayview Homes, Inc. at 27.

5. Letter, Wilmington District Engineer to Hobart Truesdale, President, First Colony Farms, February 26, 1982.

6. Letter, Robert K. Dawson to Eric Eidsness, November 17, 1982.

7. Letter, Major General John F. Wall to Commander, New England Division, May 31, 1985.

8. U.S. EPA Region I Press Release, August 13, 1985.

9. Letter, Senator Gordon J. Humphrey to Michael R. Deland, Administrator, EPA Region I, August 27, 1985.

10. Hearings before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, July 15, 1985.

11. Letter, Senator John Heinz to Vice President George Bush, September 9, 1983.

12. Hearings before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, July 16, 1982.

13. Letter, G. Ray Arnett to Robert K. Dawson, May 9, 1984.

14. Letter, Robert K. Dawson to G. Ray Arnett, June 1, 1984.

15. Letter, G. Ray Arnett to Robert K. Dawson, August 10, 1984

16. Letter, Robert K. Dawson to G. Ray Arnett, August 30, 1984.

17. Letter, J. Craig Potter to Robert K. Dawson, October 2, 1984.

18. Letter, Robert K. Dawson to G. Ray Arnett, October 18, 1984.

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19. Letter, G. Ray Arnett to Robert K. Dawson, November 7, 1984.

20. Letter, G. Ray Arnett to Robert K. Dawson, December 17, 1984.

21. Letter, William Clark to J. Ron Brinson, September 12, 1984.

22. Memo, Paul S. Keough, Region I EPA, to Josephine Cooper, December 6, 1983.

23. Memo, EPA Region V, Charles H. Sutfin to Alan Levin, December 23, 1983.

24. Letter, Robert K. Dawson, to Senator John H. Chafee, April 8, 1985.

25. Letter, Lee Thomas, Administrator, EPA, to Alan Hill, Chairman, Council on Environmental Quality, February 25, 1985.

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EXHIBIT 4

No. 84-701

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

RIVERSIDE BAYVIEW HOMES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General
F. HENRY HABICHT II
Assistant Attorney General
LOUIS F. CLAIBORNE
Deputy Solicitor General
KATHRYN A. OBERLY
Assistant to the Solicitor General
ANNE S. ALMY
ELLEN J. DUBKEE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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debating the proposal to restrict Section 404 jurisdiction, it was noted that more than half of the Nation's original wetlands already have been lost by filling, dredging, or draining and that the remaining areas are disappearing at a rate of 300,000 acres per year. 123 Cong. Rec. 26701, 26717 (1977) (remarks of Sens. Stafford and Chaffee). Congress thought it essential to put a stop to this trend in order to achieve the water quality goals of the CWA. For example, Senator Baker, a sponsor of the 1977 amendments, stated (123 Cong. Rec. 26718-26719 (1977)):

> [P]rotection of water quality must encompass the protection of the interior wetlands and smaller streams.
>
> • • • • •
>
> We should be mindful of the fact that when these [wetland] areas are polluted out of existence, we will have lost the very valuable free service of nature; and if toxic-laden dredged or fill material is discharged into wetlands, we risk poisoning the very foundation of our aquatic system.

Senator Muskie, also one of the primary sponsors of the Act, expressed similar views (123 Cong. Rec. 26697 (1977)):

> There is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage. The wetlands and bays, estuaries and deltas are the Nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife.
>
> The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of Section 404 has attempted to achieve.

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See also 123 Cong. Rec. 38994-38996 (1977) (remarks of Reps. Ambro, Lehman, and Dingell); 123 Cong. Rec. 26701-26702, 26713, 26716-26717 (1977) (remarks of Sens. Stafford, Hart, and Chaffee); H.R. Rep. 95-139, 95th Cong., 1st Sess. (1977) (additional views of Reps. Edgar and Myers).[18]

In sum, the court of appeals' conclusion that it is "not clear" (Pet. App. 13a) that Congress wanted the Corps to exercise the broadest possible jurisdiction over the Nation's wetlands is simply untenable when examined in light of the legislative history.

B. Extensive Judicial Authority Supports A Broad Interpretation Of Section 404 Jurisdiction

The court of appeals seemingly approached the issue before it as though it were a question of first impression. In fact, it is not, and, what is more, every other circuit to address the matter (either in the context of Section 404 or of other sections of the CWA that apply to "waters of the United States") has concluded that Congress intended in the CWA to assert federal jurisdiction over the Nation's waters to the full extent of its constitutional power, not limited by traditional concepts of navigability, and that the Corps' implementing regulations faithfully reflect that intent. See, *e.g.*, *United States* v.

[18] Finally, Congress also was concerned about the economic impact of the loss of wetland areas on commercial fish harvests and water treatment and flood control costs. See, *e.g.*, 123 Cong. Rec. 26716 (1977) (remarks of Sen. Chaffee); *id.* at 26718 (remarks of Sen. Baker); *id.* at 38994 (remarks of Rep. Lehman). In addition to the estimate that wetlands provide $140 billion worth of water purification and flood control services (see page 3, *supra*), specific illustrations of the economic impact of wetlands destruction were cited. In the early 1960s, for example, a channelization project on the Kissimmee River in Florida eliminated 45,000 acres of flood plain marshes. The unexpected result of the project was a "gross deterioration of water quality in the Kissimmee River and in Lake Okeechobee," into which the river flowed. To undo this damage, "it is going to cost a lot more money." 123 Cong. Rec. 26717 (1977) (remarks of Sen. Chaffee).

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EXHIBIT 5

SAVCO-E

26 February 1982

Mr. Robert G. Truesdell II
Managing Agent, Prulean Farms Joint Venture
President, First Colony Farms, Inc.
Route 1, Box 201
Creswell, NC 27918

Dear Mr. Truesdell:

I have received your letter of 8 February 1982 wherein you have pointed out very clearly your concern for several statements contained in my letter (dated 27 January 1982) to Congressman Walter B. Jones. Upon reading your letter and noting your concerns, I reviewed very carefully the statements I furnished to Congressman Jones and believe that implications were read into my statements that were not intended by me. I do not believe there is merit in either one of us escalating a reactionary dialogue on these matters. However, I will comment on some of the issues raised, as you requested, and with this letter reiterate my primary interest and responsibility to administer this difficult program in as fair and impartial manner as possible.

A comment is in order regarding the uncertainties you mentioned regarding the jurisdiction of the program and of the ultimate permit decisions. The prevailing uncertainty over the jurisdictional extent of the law is perhaps one of our own making because of our seeking, through nationwide permits and other means, a justification for limiting the jurisdiction of the Clean Water Act to some boundary less than the full breadth of the wetlands found in the term "all waters of the United States." Thus, this uncertainty stems from our effort to reduce the regulatory requirements on, and accommodate the interests of, land developers such as First Colony and Prulean.

There is also the underlying uncertainty regarding the ultimate decisions on applications for permits. As you pointed out, the Corps agreed in September 1980 to consider, without the preparation of an Environmental Impact Statement (and thereby expedite), permits for your resumption of work in areas which were already significantly disturbed by existing pumped drainage practices. These permits required extensive discussion and coordination with other agencies before being issued in early 1981 and now, after a year has passed, they still are the only significant Section 404 permits in the Nation for the conversion of wetlands to agricultural development.

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SAWCO-E
Mr. Robert G. Truesdell II

26 February 1982

We have exercised our discretion and made some unprecedented decisions on this issue because of our belief that the overall public interest would have us do so. Now, we are seen by conservationists as seeking to stretch our judgment too far in the direction of accommodating development; whereas, we are seen by development oriented interests, including some State officials, as "destroying the economy" and generally delaying needed development. We seem to be reaching a point where we have little support from either side. Nevertheless, in late 1980, I made a decision upon review of your application for the conversion of 23,000 acres of wetland in Dare County that your requested permit may be warranted, but that the proposed work would "significantly affect the quality of the human environment." That decision stands, and we will continue to implement our regulations and the requirements of the National Environmental Policy Act by preparing a detailed Environmental Impact Statement based on the information furnished by Prulean.

I wish to offer a few comments regarding our position on the jurisdictional proposal made by Mr. Paul Larsen in your behalf in December 1981. There were unfortunately no legal options presented for me by Mr. Larsen other than the applicability of the Corps' so-called "headwaters" nationwide permit. However important the other issues of economics and social impact may be, these factors can be significant only in deciding whether or not to issue a permit, not in deciding whether one is required if the proposed work is to be done. Our established procedures for locating headwater points on streams involve rather straightforward, basic engineering measurements which are easily duplicated and verified by others. Mr. Larsen proposed that our policy of using these basic procedures be abandoned in favor of accepting a geologic approach involving consideration of soil types rather than existing waterflow patterns. I could not adopt such a completely different approach considering the threat such a decision might have to the dozens of previous headwater decisions in this District, as well as the additional wetland areas that would then be included below such "headwaters." There was also no indication from my review of the Corps regulations that the nationwide "headwaters" permit could be extended in that manner.

I share Mr. Hollis' disappointment expressed at the 29 December meeting that we were given no prior opportunity to assist and advise Mr. Larsen in his effort to explore alternative jurisdictional considerations, just as I believe we have explored and extended to Prulean Farms every advantage we know of within the law and the regulations, including our decision in 1980 to move toward the issuance of a permit balanced in the public interest. I am sure you can appreciate the seriousness, in the face of the Clean Water Act, of your plans and the plans of others to convert additional acres of wetlands to a different use--an action some would argue was intended to be prevented by the Act. Given, then, this office's unprecedented efforts to move toward issuance of permits for such extensive wetland conversion, I must reject the blame that has been thrust upon the Corps of Engineers for the problems of those seeking such development.

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SAWCO-E
Mr. Robert G. Truesdell II

26 February 1982

At the request of Mr. Randall Pope, I am furnishing him a copy of this letter.

Sincerely,

ROBERT K. HUGHES
Colonel, Corps of Engineers
District Engineer

Copy Furnished:

Honorable Walter B. Jones
House of Representatives
Washington, DC 20515

Mr. Randall Pope
Prudential Insurance Company
6220 S. Orange Blossom Trail
Suite 175
Orlando, FL 32809

305 - 851-1270
REAL ESTATE INVESTMENT OFF

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EXHIBIT 6

DEPARTMENT OF THE ARMY
OFFICE, ASSISTANT SECRETARY
WASHINGTON, D.C. 20310

MEMORANDUM

November 17, 1982

Mr. Eric Eidsness
Assistant Administrator
for Water
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Eric:

Mr. Gianelli and I are looking forward to the meeting at EPA on Monday evening.

When we last spoke I told you that I would get over to you the attached elaboration of our four main areas of concern. I believe you will agree that our desired reforms are in line with the President's and Vice President's approach to good government and minimal regulatory intrusion while still providing the full environmental protection called for in the law.

I will be pleased to discuss any of these points with you prior to the meeting.

Robert K. Dawson
Deputy ASA(CW)

Attachment

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1. Regulation or guideline? In addressing this question in 1975, EPA stated that the guidelines must be adaptable to local conditions at the discretion of the permitting agency to determine unacceptable harm to the aquatic system. (40 FR 41292). The proposed rules on September 18, 1979 drew wide criticism that the guidelines had been made regulatory in nature. The final rules adopted in December, 1980, without Army concurrence, incorporated the regulatory view of the guidelines. We believe the 1975 policy is far better suited to effective and efficient program management and are still unaware of any adverse effects of the 1975 version which may have prompted the change adopted in 1980. We believe further that the administrative record of the 1980 action contains documentation which would easily have supported maintaining the "guideline" approach.

2. Presumption of guilt. The statute provides that a discharge will be considered environmentally harmful unless shown not to be. First, we have concerns over the degree of proof which the guidelines now require to refute this presumption. That is addressed in item 4 below.

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Also, however, we are concerned that EPA additional presumptions have been imposed which go well beyond the statutory requirements and impose unwarranted burdens of proof on the public and the Corps. Section 230.10(a) presumes that the best alternative is the one which has the least environmental harm. This is inconsistent with the statutory requirements of 403(c) which calls for consideration of economic and other factors and with NEPA which requires equal consideration of economic, social, and environmental factors. Section 230.10(a)(3) states that upland alternatives are presumed to be available for non-water dependent activities. We know of no statutory requirement for such a presumption and no one has defined "water-dependent." Because of the serious disputes about the meaning of the term and the absence of statutory support, the presumption should be dropped. That same section contains another presumption that discharges at upland sites have less adverse impacts than discharges in aquatic ecosystems. This presumption carries with it substantial risk that objective review would be jeopardized. We believe it is critical to successful program administration that flexibility is retained to the maximum extent possible, similar to the policies EPA adopted in 1975. Absent a statutory requirement, imposing such presumptions goes well beyond the principles of good government.

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3. Presence of policy statements. The statute calls for EPA to develop guidelines for the Army to use in determining whether to allow a discharge to occur. The 1975 guidelines went somewhat beyond that and the 1980 guidelines go extremely far beyond that. We can see no justification, for example, to include definitions which appear more appropriately in Army regulations, nor to include the presumptions noted in 2. above, mitigation policy, nor policy on examination of alternatives.

4. Degree of documentation. Subparts C through F list requirements for factual determinations. There are well over 300 parameters listed. The documentation of compliance with the guidelines, even in non-controversial cases, requires a major administrative effort. In an attempt to ease the administrative burden, the Corps developed a check list to be used in simple, routine cases. The check list alone is seven pages long. There are many examples of narrative type 404(b)(1) evaluations which exceed the length of NEPA documents and the official Statement of Findings combined. Such lengthy documentation requirements seem to be entirely disproportionate with the degree of impacts on water quality and the environment.

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DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

EXHIBIT 7

REPLY TO ATTENTION OF:

31 MAY 1985

DAEN-CWO-N

SUBJECT: Permit Decision for an Application for a Fill for a Proposed Shopping Mall in South Attleboro, Massachusetts

Commander, New England Division

1. Reference your letter of 2 May 1985, SAB.

2. I have reviewed your working draft documentation and have provided my findings in the enclosure (Views of the Chief of Engineers).

3. I had elevated this case for my review in order to resolve the policy issue of practicable alternatives as applied to non-water dependent activities under the Section 404(b)(1) guidelines and the use of mitigation to satisfy 40 CFR 230.10(a),. I have determined, that in a proper case, mitigation measures can be used to reduce adverse impacts of a proposed activity to a point which would allow 40 CFR 230.10(a) to be satisfied.

4. Based on my findings, it is my decision that the proposed project complies with the 404(b)(1) guidelines and is not contrary to the public interest.

5. You are directed to reconcile your documentation with the guidance contained within the enclosure. You should then proceed to develop appropriate special conditions to insure the success of the mitigation and to prepare your notice of intent to issue pursuant to the 404(q) MOAs.

FOR THE COMMANDER:

Encl

JOHN FLOOD
Major General, USA
Director of Civil Works

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EXHIBIT 8

United States Environmental Protection Agency Region I

Office of Public Affairs John F. Kennedy Federal Building Boston, Massachusetts 02203

Connecticut Maine Massachusetts New Hampshire Rhode Island Vermont

EPA Environmental News

August 13, 1985

For more information call Brooke Chamberlain Cook 223-6304

BOSTON -- Michael R. Deland, Regional Administrator for the New England office of the U.S. Environmental Protection Agency (EPA), today took the next step in a process that may result in the veto of a Corps of Engineers permit for a shopping mall construction project in a wetlands area in Attleboro, MA. The project is proposed by Pyramid Companies of Boston and Syracuse, N.Y. According to EPA, it may have unacceptable, adverse impacts on the wetland, known locally as Sweedens Swamp.

Deland today signed a notice, to be sent to the Federal Register, of a proposed determination to prohibit or restrict the discharge of fill material into Sweedens Swamp. The notice provides the public with a 60-day period to comment on all issues involved in the case. A public hearing is scheduled for September 26, 1985 from 7:00 - 11:00 p.m. in the Attleboro High School auditorium.

Stated Deland, "From the evidence made available to date, the adverse impacts to wildlife that could result from the destruction of Sweedens Swamp are unacceptable because they are avoidable. I believe the public should have every opportunity to address such issues as the feasibility of relocating the project versus the feasibility of relocating the wetlands. This process will provide the public with the first opportunity to evaluate Pyramid's off-site mitigation proposal."

On July 23, 1985, Deland notified the Corps of his intent to initiate the Clean Water Act's Section 404(c) permit review process. A 15-day consultation period followed. After reevaluating the proposal and further discussing it with representatives of Pyramid, Deland reiterated his view that the facts to date do not justify filling 30 acres of wetland.

Last month, the New England Division of the Corps, under instructions from its headquarters office in Washington, D.C., informed EPA of its intent to issue a permit for the mall project. The Corps' Washington office decided that the permit should be issued, over EPA's objections.

(more)

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The Corps based its decision to issue a permit on the anticipated benefits of a wetland creation project proposed by Pyramid as a mitigation measure. While EPA acknowledges the effort by Pyramid to provide mitigation, the agency believes that wetland creation may only be used to mitigate unavoidable losses and that the burden of proving that such losses are unavoidable rests with the applicant.

EPA's involvement stems from Section 404 of the Clean Water Act, which establishes a permit program regulating the discharge of dredged or fill material to U.S. waters, including wetlands. It is jointly administered by EPA and the Army Corps of Engineers. The Corps processes permit applications and makes the decision on whether or not to issue permits. EPA reviews and comments on the applications.

In addition, under Section 404(c) of the Clean Water Act, EPA is authorized to prohibit or restrict the filling of wetlands whenever it determines there would be an unacceptable, adverse impact.

Within 15 days after the close of the public comment period, Deland will decide either to withdraw his notice of proposed determination or recommend to EPA headquarters in Washington, D.C. that the use of the wetland area be restricted or prohibited.

The final decision will be made in Washington, D.C. by EPA's Assistant Administrator for External Affairs.

-30-

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EXHIBIT 9

GORDON J. HUMPHREY
NEW HAMPSHIRE

ARMED SERVICES
ENVIRONMENT AND PUBLIC WORKS

United States Senate

WASHINGTON, DC 20510

August 27, 1985

RECEIVED

AUG 29 1985

Mr. Michael R. Deland
Regional Administrator
U.S. Environmental Protection
J.F. Kennedy Federal Building
Boston, Massachusetts 02203

Dear Mike:

I am writing to express my strong support for your recent decision to begin the review process which may lead to a veto of a Section 404 permit for the construction of a shopping mall in Attleboro, Massachusetts.

As a member of the Senate Committee on Environment and Public Works, I have become increasingly concerned with the administration of the 404 program. Over the past several months, the Subcommittee on Environmental Pollution has been holding a series of hearings on the 404 program, and those hearings have served to highlight diverging interpretations among various parties over how the program should be administered. It is my view that Section 404 stands at the center of our national effort to preserve and protect some of our most valuable natural resources. As such, it should be administered with these objectives in mind. However, it has become apparent that the Army Corps of Engineers has been less than committed to these important objectives. For instance, in one of the more outrageous cases of disregard for the law, the Corps of Engineers issued a Section 404 permit for the Westway real estate development and highway project in New York City. The affect of this permit is to mandate the destruction of valuable fish habitat resources through the filling in of hundreds of acres of the Hudson River.

In the case of the Attleboro mall, the Corps of Engineers is proposing to issue a permit to fill in 30 acres of wetland which, according to the U.S. Fish and Wildlife Service, the New England Division of the Corps of Engineers, and EPA is an excellent wildlife habitat. While this may be consistent with the Corps' recent behavior, I find it particularly disturbing that this decision was made by the Washington headquarters, and that the decision was in direct conflict with the recommendations made by the Corps' New England Division.

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Mr. Michael R. Deland
Regional Administrator
U.S. Environmental Protection Agency
Boston, Massachusetts 02203
Page Two

I am encouraged that you have recognized the need to restore some integrity into the 404 program. If we continue to issue permits for projects that threaten such needless destruction of wetlands and for which practical alternatives exist, then how long will it be before the nation's remaining wetland resources are all paved over for shopping malls, real estate development and highways? How many more Attleboro's or Westway's will there be?

Again, let me commend you for your decision. I hope the Agency will continue to view the Attleboro mall case in an environmentally responsible manner.

With warmest regards, I am

Sincerely yours,

Gordon J. Humphrey, USS

GJH:gmp
cc: Honorable Lee M. Thomas
Robert K. Dawson

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EXHIBIT 11

John Heinz
Pennsylvania

United States Senate

Washington, D.C. 20510

Committees
Finance
Banking, Housing and Urban Affairs
Energy and Natural Resources

September 9, 1983

The Honorable George Bush
Vice President of the United States
Washington, D.C. 20510

Dear Vice President Bush:

My good friend, Ralph Abele, the Executive Director of the Fish Commission in Pennsylvania has urged me to contact you regarding steps taken by the Army Corps of Engineers that would undermine protection of our nation's wetlands. Therefore I am writing to request that the Army Corps of Engineers protect wetlands and other aquatic systems of our nation as mandated by Section 404 of the Clean Water Act.

Administrative reforms granted by the Task Force on Regulatory Relief, announced on May 7, 1982, have resulted in a weakening of these requirements. Because I do not believe that you intended this, I urge you to take action to redirect the Corps.

Relying on the May 7, 1982 announcements, the Corps has successfully demanded that federal resource protection agencies sign new agreements on review of permit applications. These agreements, now in force, severely curtail the opportunity of the Environmental Protection Agency, Interior Department, and Commerce Department to ensure that dredge and fill activities will not damage the environment. Among other unfortunate changes, the agreements now allow elevation of major permit decisions above the level of Corps district engineer only if requested by a Presidential appointee in a resource agency and even then only if the Assistant Secretary of the Army (Civil Works) concurs.

On July 22, 1982, the Corps issued comprehensive new regulations for its permit program including new and revised nationwide general permits. Among these are authorizations for unlimited discharges into "isolated" wetlands and wetlands above the headwaters of streams and rivers. Most of the wetlands of our nation are covered by these permits and millions of wetland acres were left unprotected as a result of the July 22nd regulations. Among these are 6,168 acres or 57 percent of all wetlands in the Pocono Mountains of Pennsylvania.

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On May 12, 1983, the Corps proposed to amend its regulations once more. Among many questionable ideas, the Corps has proposed to define "wetlands" in a way that would entirely remove from federal oversight bottomland hardwoods, much tundra, and wetlands across the nation in the upper levels of floodplains. The Corps also would insert a host of new criteria into permit review that appear to promote development at the expense of environmental protection. Now the Corps prohibits issuance of permits unless "in the public interest,", but the new regulations would mandate issuance unless "contrary to the public interest." Another new section would state: "When private enterprise makes application for a permit, it will generally be assumed that . . . the proposal is economically viable and there is a need for it in the marketplace."

A Harris poll conducted last December reported that 83 percent of the American public feels it is "very important" to keep wetlands free from further destruction. A mere 3 percent would loosen federal protection, while 22 percent want to maintain existing standards and 69 percent want federal standards that are more strict.

Wetlands prevent floods, recharge groundwater, reduce erosion, help to maintain water quality and are critical to the survival of fish and wildlife. Please take steps to assure that the Corps embraces its responsibilities under the Clean Water Act with respect to our wetlands.

Sincerely,

John Heinz
United States Senator

JH/sask

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EXHIBIT 13

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Honorable Robert K. Dawson
Acting Assistant Secretary
of the Army (Civil Works)
Department of the Army
Washington, D.C. 20310

May 9, 1984

Dear Mr. Dawson:

Reference is made to two April 11, 1984, Notice of Intent to Issue letters from Colonel Smith, District Engineer, Charleston District, to Mr. James Pulliam, Regional Director, U.S. Fish and Wildlife Service (Service), Atlanta, Georgia, regarding permit applications by Mr. C. E. Graham Reeves and by Mr. Jack Maybank. In accordance with the 1982 MOA between the Departments of the Army and the Interior, I am requesting this decision be reviewed at the Assistant Secretary level. The decision to issue permits for these projects creates the necessity for policy-level review of issues of national importance and hence meets the elevation criteria established in the 1982 MOA.

Mr. Reeves proposes to reconstruct and expand remnant existing embankments, construct new embankments and install water control structures in wetlands adjacent to Minim, Cork and Little Duck Creeks on Minim Island, Georgetown County, South Carolina (PN 81-SD-220). Mr. Maybank proposes to construct new embankments and install water control structures in wetlands adjacent to the South Edisto River and Watts Cut on Jenossee Island, Charleston County, South Carolina (PN 82-2D-263).

The subject permits involve creation of approximately 1,500 acres of waterfowl impoundments by diking off historic rice field wetlands that are currently functioning as undisturbed, regularly and periodically flooded marshes. Approximately 100 acres of marsh would be directly destroyed by dike construction, and large acreages of wetlands would be functionally isolated from the aquatic ecosystems they support.

I perceive several violations of national policy. These projects are clearly precedent setting in nature, yet cumulative impacts are not adequately addressed in the Environmental Assessments, Statements of Findings or the 404(b)(1) evaluations. Considering the public resources that would be sacrificed to achieve the limited benefits, the decision to issue represents a failure of public trust responsibility and violation of 33 CFR 320.4(a)(1).

In the Santee Delta system, 41 percent of tidal wetlands are already in impoundments, with Mr. Reeves owning approximately 1,200 acres thereof. His proposal would convert an additional 650 acres to the impounded total thus raising to 43 percent the amount of functionally impaired wetlands.

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In the St. Helena Sound system, 22 percent of tidal wetlands are impounded, 12,000 acres being located within a 3-mile radius of Mr. Maybank's project site. His proposal would convert an additional 900 acres to the impounded total thus raising to 23 percent the amount of functionally impaired wetlands. As resource managers, the Service has concluded that the profusion of existing impoundments in these areas offers ample specialized habitat for attracting migratory waterfowl and incidental mariculture. On this basis, it is the open marsh habitat that is more critically needed or limiting, for resource protection, and conversion of more marsh acreage to impoundments would not be in the best public interest.

I am particularly concerned about the district engineer's findings on the issues of:

- detrital export to adjacent waters
- ingress and egress of aquatic organisms
- filling intertidal marsh from embankment construction
- precedent-setting nature of the projects

On all of these issues, the Service, in conjunction with National Marine Fisheries Service, Environmental Protection Agency and the South Carolina Wildlife Department, concluded that the proposed projects will have detrimental ecological impacts. These conclusions were made after careful analysis of supporting literature resulting from studies conducted near these areas and in similar habitats. The supporting data clearly shows that the natural function of these marshes will be disrupted and that the resource values they possess will be diminished. Under the Fish and Wildlife Coordination Act, the Congressionally authorized responsibility to determine the biological impacts of these projects clearly lies with the Service and other State and Federal resource agencies. The decision to issue or deny these permits is unique in that it results in a determination of which biological system (natural marsh or duck pond impoundment) is of greater ecological value. While the district engineer may elect to issue a permit in spite of Service-documented resource losses, while stating his reasons for doing so, we do not believe it is within his authority to contradict our biological findings and use this contradiction to help justify his decision. This is an erroneous exercise in logic resulting in a flawed decision, and, if used in the future, will cause continued and needless resource losses.

Sincerely,

[illegible]

G. Ray Arnett
Assistant Secretary for Fish
and Wildlife and Parks

Enclosure

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EE EXHIBIT 14

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310

June 1, 1984

Honorable G. Ray Arnett
Assistant Secretary for Fish
and Wildlife and Parks
Department of the Interior
[illegible]

Dear Mr. Arnett:

This responds to your letter of May 9, 1984, requesting my review of a decision by the Charleston District Engineer to issue two Department of the Army 404 permits (Reeves and Maybank). You have requested elevation of these permit actions based on issues you feel require policy level review. The issues you raised in the supporting documentation include what you assert are the precedential nature of the action, inadequate consideration of the cumulative impacts, technical issues related to the impacts, a contradiction of the resource agency biological findings, and the results of the balancing process leading to a decision to issue the permits.

In accordance with the Corps' regulations and the 404(b)(1) guidelines, the District Engineer is required to examine the items related to the technical issues. The documentation indicates he has done so and has considered the cumulative impacts of the proposed actions. We do not feel these considerations are precedent setting. Your agency's disagreement with the adequacy of that determination is a technical evaluation matter and is not a basis for elevating the decision under our 1982 Memorandum of Agreement (MOA).

The District Engineer is charged with arriving at a balanced decision after considering all factors.

The contradiction you refer to is more of a balanced consideration of all factors used by the District Engineer in conducting his public interest review. The District Engineer is required by the Fish and Wildlife Coordination Act to consider the resource agency's assessment of the biological impacts of proposed activities, and he has done this. Although your agency disagrees with his action, balancing the factors after considering your assessment is a technical matter and is not a basis for elevation under our MOA.

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Accordingly, I do not believe it appropriate to grant the elevation of this case under our 1982 Memorandum of Agreement. However, I would note the Environmental Protection Agency has already initiated the process under Section 404(c) to further consider the potential adverse environmental effects of the proposed projects. If that process results in issuance of the permit we will, in light of your strong concerns, monitor with special care the resulting effects and the permit conditions which the District Engineer included to minimize these effects.

Sincerely,

Robert K. Dawson
Acting Assistant Secretary of the Army
(Civil Works)

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EXHIBIT 15

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Honorable Robert K. Dawson
Acting Assistant Secretary of
[illegible] works)
Department of the Army
Washington, D.C. 20310

AUG 10 1984

Dear Bob:

I received your letter of June 15, 1984, responding to my request to revise the Section 404(q) Memorandum of Agreement (MOA) between our two Departments. I appreciate the consideration you gave the request, the timeliness of your response, and the fact that you agree with some of the points I raised. I will have the Fish and Wildlife Service (Service) contact you to continue staff work on these issues.

I am disappointed, however, that you have narrowed the scope of potential revisions that Bill Gianelli envisioned in his letter of May 2, 1984. In that letter, Bill said he would have his staff look into a mechanism for coordination between the Service and the applicant or the Corps after the District Engineer's decision, but prior to elevation, with the condition that the timeframe for a decision on a permit not be prolonged.

With regard to your concern about involving the Division Engineer in such a consultation process prior to elevation, I remind you that we are not requesting an expansion of the elevation timeframe. Simply put, this would be an opportunity for our Regional Director (a second-level official) to discuss complex cases in an informal manner with the Corps second-level official, the Division Engineer, in order to resolve differences before the formal elevation process is initiated. I would very much like to pursue resolution of this issue as well as others.

I am also disappointed that the changes I recommended in the MOA have been interpreted as contrary to the guidance of the Presidential Task Force Report on Regulatory Relief. The Service staff reviewed its proposed MOA in light of the Task Force Report and made appropriate changes. You should remember that the Task Force recommendations were meant to reform the permit program "without compromising its important environmental protections." I believe that environmental protection is deteriorating because of the deficiencies in the current MOA and fear that you are following the Task Force recommendations without recognizing their dual goals.

It is not my intent to question your decisionmaking authority by urging that my elevation requests be honored, however, I believe that the elevation requests have been eminently reasonable and justifiable, and are intended to protect the public interest in the fish and wildlife

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resources in question. Yet, half of the elevation requests under the current MOA (i.e., 9 out of 18) were summarily refused by your agency. An elevation simply means the District Engineer's decision will be reviewed, not necessarily changed. Propriety, alone, would dictate your honoring my requests. I know of no other instance wherein a simple request of one department official to another is so perfunctorily denied.

I urge you to reconsider your decision on the channel I previously requested. I have instructed my staff to work with your staff to resolve the details of the changes you have agreed upon in principle and to explore further any possible solutions to the problems this Department is experiencing with the current MOA.

Sincerely,

G. Ray Arnett
Assistant Secretary for Fish
and Wildlife and Parks

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EXHIBIT 16

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310

30 AUG 1984

Honorable G. Ray Arnett
1600 S. Eads Street, Apt. 134-N
Arlington, Virginia 22202

Dear Ray:

Thank you for your letter of August 10, 1984, concerning possible revisions to the Section 404(q) Memorandum of Agreement.

I would be pleased to continue discussions in a constructive manner on any and all points of concern to DOI. My letter of June 15, 1984, to which you took exception was intended to be, and was, an honest, forthright statement of my position.

Two points in your letter specifically deserve candid comment in the interest of establishing a solid basis upon which constructive discussions can build.

Your letter claims that environmental protection is deteriorating because of deficiences in the current MOA, an assertion which when made public as these communications always seem to be, provide easy ammunition for Administration critics in the courts and in political forums. You have made the same claim previously on several occasions, yet we are still unaware of any data or other documentation you have to support such a claim.

We are as interested as you are in a quality environment and would certainly be guided in any revisions to the MOA by such data or documentation. However, in the absence of a better indication of environmental harm, we would be reluctant and I think ill-advised to make significant changes to an effective agreement, one which has provided the regulated public much more responsive government.

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The second point is your characterization of previous elevation requests being "summarily refused" and "perfunctorily denied". A literal interpretation of those phrases could be taken as serious charges impugning the professional integrity of this office. I am certain you did not intend such a strong and unfounded criticism, but it is troublesome since we have worked so closely and effectively in so many areas.

I can assure you that I personally have considered each and every elevation request thoroughly, have sought the views of the Corps field and headquarters staff and evaluated the requests in light of the enumerated elevation criteria. Each elevation action is supported by thorough analysis and documentation. I am unaware that anyone on your staff has reviewed our analysis and documentation and am perplexed as to how they could have suggested to you that our actions were summary or perfunctory.

Sincerely,

Bob

Robert K. Dawson
Acting Assistant Secretary of the Army
(Civil Works)

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EXHIBIT 17

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

OCT 2 1984

Mr. Robert K. Dawson
Acting Assistant Secretary
of the Army (Civil Works)
U.S. Department of the Army
Washington, D.C. 20310

Dear Mr. Dawson:

In accordance with provisions of the 1982 Memorandum of Agreement (MOA), I request that you give higher level review to the decision of the District Engineer, Norfolk District, relative to Public Notices NAOCP-79-0121-06 and NAOCP-80-0264-06. The applicants, the Prince Edward County Board of Supervisors and the Piedmont Soil and Water Conservation Districts, wish to implement a Soil Conservation Service (SCS) Watershed Plan and have applied for Department of the Army permits to construct earthen dams with resultant impoundments for flood control and future water supply. The dams are to be located in the Bush River Watershed in Prince Edward County, Virginia, and would impound 740 acres (Site 12) and 100 acres (Site 4B). The District Engineer, in the Notice of Intent to Issue dated August 27, 1984, stated that he intends to issue a permit for Site 4B as a fillow reservoir, while Site 12 would be approved as a dry dam, an impoundment that is designed to fill with water only when a flood event occurs, with conditional approval for filling the reservoir at a later date if the applicant can prove a need.

I am requesting this review based upon: (1) the development of significant new information; (2) insufficient interagency coordination; and (3) the necessity for policy level review of issues of national importance. The detailed rationale supporting my position can be found in the accompanying Position of the Department of the Interior. A summary of these issues follows.

New and significant information concerning the Site 12 impoundment was provided in a recent study funded by the Environmental Protection Agency (EPA). The purpose of the study was to address, in further detail, specific issues that were raised by EPA and not adequately addressed by the District Engineer concerning potential primary, secondary, and cumulative impacts of the proposed impoundments. The areas of study included water quality, hydrology, wetlands, and aquatic resources. The District Engineer, in his Statement of Findings, refused to consider this additional information.

Our information indicates that the Corps of Engineers (Corps) conducted insufficient coordination between its District staff and the Fish and Wildlife Service (Service) Field Office personnel regarding the

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involved in and provided information to an interagency technical working group comprised of representatives of the Corps, the Service, and SCS, that was established to develop a mitigation plan. Based on the information we have, it was agreed by all that the wetlands values they established were to be a beginning for formulation of the mitigation plan. Further review and refining of the plan was to occur in consultation with the Service. Further consultation and refinement with [illegible] Edward County Board of Supervisors submitted a completed mitigation plan to the Service for review. Because of the feeling that more mitigation is warranted than is now proposed, the Service cannot support the present mitigation plan.

Three policy issues of national importance are involved with this request. First, the sufficiency of the environmental documentation for this project is questionable. The National Environmental Policy Act requires that a federally permitted project include adequate environmental documentation. The SCS previously determined that an EIS was required for this Public Law 566 Project. Yet, the District Engineer did not adopt or use any of the information from the SCS EIS in spite of the fact that he is required to do so in the 1982 MOA. Additionally, Corps regulations at 33 CFR 320.4(b)(4), the 404(b)(1) guidelines, and Regulatory Guidance Letter No. 84-9 require adequate documentation of permit decisions, including evaluation of cumulative impacts and practicable alternatives to the proposal. The District Engineer's single paragraph treatment of cumulative impacts and alternatives does not, in our view, adequately fulfill the above described requirements. In addition, to being an issue of national significance requiring policy level review, we feel that this aspect of the permit review also constitutes insufficient interagency coordination.

Second, the District Engineer "conditionally approved" filling the reservoir at Site 12 with water at some future time when the need is proven to his satisfaction. The decision to issue or deny a permit should be based on current need, not on an unproven future need. It is our understanding that the current water situation in the watershed is: (1) dry dams will satisfy all flood control needs; and (2) water use demand exists for only 30% of the current water supply. Because of this, we feel a conditional approval is not warranted. A conditional approval circumvents the responsibilities of the District Engineer to evaluate the public interest balancing factors and of the Service to evaluate impacts of the project on fish and wildlife resources and recommend appropriate mitigation measures. Authorizing the potential loss of or damage to wetlands of national importance without providing the opportunity to properly evaluate the need for such a loss is contrary to existing Corps regulation found at 33 CFR 320 and the guidance found in Regulatory Guidance Letter 84-9.

Third, the District Engineer, in his Statement of Finding, rejected the Service's migitation recommendations without providing factual support. While the District Engineer may elect to issue a permit without incorporating the Service's recommendations, the decision to do so must be supported by facts, described in the Statement of Finding, that [illegible]

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of the Service's recommendations. No such facts were presented in the Statement of Finding. Phrases such as: "I am not going to accept . . .—I intuitively feel . . .—I believe . . . ." were used by the District Engineer to address the Service's recommendations. We have great difficulty with any decision to allow such conjecture to stand as sufficient rationale for deciding permit approval and mitigation issues.

The environmental documentation issue was raised to the Department of the Army's attention on two previous occasions: the Maine Department of Transportation's Sassanoa project and the Carolina Refining and Distributing Company pipeline project in South Carolina. The mitigation issue was raised earlier in the St. Mary's project in Maryland.

Bob, the occurrence of so many individual projects where the Service has similar concerns points out the need to review the Corps' environmental documentation and mitigation policies and their implementation. These policy issues are clearly within our area of authority because the Service is one of the Federal agencies designated by the Coordination Act to assess impacts of water-related development projects on fish and wildlife resources and develop mitigation measures to lessen those impacts. The Service has special expertise in these areas and its recommendations should not be arbitrarily rejected without cause.

In summary, I request that the decision to issue these two permits, as proposed by the District Engineer, be reviewed in light of the issues I raised. I suggest that the alternative of requiring dry dams for the purpose of flood control would greatly reduce project-caused significant individual and cumulative impacts on fish and wildlife resources. Moreover, I recommend that if the permits are issued, the mitigation plan for the projects be developed in close consultation with the Service. I am available, at your convenience, to discuss this with you further.

Sincerely,

(Sgd) J. Craig Potter

Acting Assistant Secretary for
Fish and Wildlife and Parks

Enclosure

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EXHIBIT 18

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310

18 OCT 1984

Honorable G. Ray Arnett
Assistant Secretary of the Interior
for Fish, Wildlife and Parks
Department of the Interior
Washington, D.C. 20240

Dear Ray:

This responds to the Department of the Interior's (DOI) request of October 2, 1984 for review of the Norfolk District Engineer's decision to issue a permit for three dams in the Bush River, Virginia, watershed.

I have carefully reviewed your request and a similar one from the Environmental Protection Agency (EPA) and have determined that requirements for elevation under the Memorandum of Agreement have not been met.

You indicated that there was new information which had not been considered, that there was insufficient field coordination, and that there are three policy issues of national importance which must be addressed.

Regarding the new information, the document in question is a report prepared under contract to EPA in which information was of variance with information previously developed. That document was fully considered by the District Engineer in his decision. It is referenced specifically in two places and indirectly in several others in the Statement of Funding (SOF). There is one sentence in the District Engineer's SOF which may have led you to conclude that he had not considered the report. The sentence is on page 3 of his findings and reads, "In view of the fact that the original inventory was performed by two Federal agencies (one a resource agency with extensive wetlands expertise) in accordance with a four-year-old interagency agreement, I am not going to preferentially accept any reappraisal by a private consultant." This was incorrectly characterized in your letter as, "...refused to consider this additional information." The correct interpretation of the misleading sentence is that the District

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was faced with conflicting information on the extent of wetlands. He opted to give more credence to the information compiled by the Corps staff and the Fish and Wildlife Service (FWS) staff than to last-minute information developed by a contractor. The fact that he did consider the EPA is reinforced by the next paragraph of the SOF wherein the District Engineer acknowledges directly the value of the wetlands as asserted by the EPA report. There are several other indirect references to the EPA information. My staff contacted the Norfolk District Engineer and confirmed this understanding of his treatment of the EPA report.

Regarding your assertion of insufficient coordination, I believe that coordination could have been better, but the coordination which did take place was sufficient to provide full and fair consideration of the views of the FWS. As I understand your concern, the mitigation plan was developed without participation of the FWS. I agree that there could have been such direct involvement. However, the administrative record indicates that FWS was furnished a proposed plan prior to any decisions; they commented on the plan and their comments were fully considered by the District Engineer in his reaching a decision on an appropriate mitigation plan. I will notify the Corps to be more sensitive to continuing involvement of the FWS in their areas of expertise.

The first issue you raise as a policy matter is that of adequate documentation. I am unaware that such a consideration is within the area of expertise of the FWS or even that it is subject to policy discussions. Documentation requirements are established through Administration Procedure Act rulemaking. They cannot be changed as a matter of policy agreement between two agencies. The decision-making official is solely responsible for ensuring that all necessary documentation is "adequate." I believe the record demonstrates that current documentation requirements have been met.

The second issue is the District Engineer's conditional approval of filling the site 12 dam at some future time. You assert some circumvention of public coordination and proper weighing and balancing. However, the potential for filling the dam was reflected in great detail throughout the record of this action and the weighing and balancing of whether to fill or not to fill is addressed directly in the

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District Engineer's findings. The very procedures you claim have been circumvented have, in fact, been followed and are well documented in the record, including evaluations of and concerns expressed by the FWS.

The third issue addresses the District Engineer's SOF. I infer from your letter that you believe the SOF does not present sufficient facts to reject recommendations of FWS. First, recommendations of FWS were not rejected because the project was modified, conditions imposed, and mitigation added based in part on recommendations from FWS. Secondly, there is no requirement for a lengthy display of facts and figures in an SOF. Decisions rest on the full administrative record, not on the SOF alone. As indicated in 33 CFR 325, an SOF is a summary of the decisionmakers' views on the issues. Supporting factual documentation is included in the full administrative record. Additionally, as in the discussion of your first issue, adequacy of documentation is not a policy matter, it is established through regulation, and writing an SOF is not an area of expertise of FWS.

Based on my analysis of the documentation, the District Engineer has considered all information available to him, including the EPA report; and he fully considered FWS views on mitigation. Further, two issues you raise as policy issues are, in fact, concerns with required documentation and the scope of a District Engineer's authority to condition a permit both of which are established by regulation through rulemaking and not subject to change without additional rulemaking. The third issue appears to be a misunderstanding of the function of an SOF.

I will be pleased to discuss this decision with you further at your convenience.

Sincerely,

Robert K. Dawson
Acting Assistant Secretary of the Army
(Civil Works)

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EXHIBIT 19

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

7 NOV 1984

Mr. Robert K. Dawson
Acting Assistant Secretary of the Army
(Civil Works)
Department of the Army
Washington, D.C. 20310

Dear Bob:

For nearly two and a half years, our Departments have been involved in an exchange of views relative to the Department of the Army's (Army) implementation of our interdepartmental Memorandum of Agreement (MOA). It is now abundantly clear that further correspondence on this issue is pointless and that Army's regulatory program is so flawed, it is no longer a useable tool to adequately protect wetlands.

In response to your August 30, 1984, letter, the proposals I have made relating to modifying the MOA are necessary; are supported by the accompanying data; do not extend the existing permit review timeframe, and are consistent with the Vice President's regulatory relief program. Unfortunately, they were rejected by your Office. As of this writing, Army's refusal to incorporate Fish and Wildlife Service (Service) proposals in those permits I requested be elevated has resulted in a direct loss or degradation of over 69,000 acres of wetlands. That total could have been avoided or significantly reduced had Army followed the Service's recommendations.

Furthermore, of the 23 permits for which elevation was requested but rejected by Army, four have resulted in lawsuits and four have resulted in Section 404(c) actions based on environmental grounds. This hardly results in a streamlined, timely, or predictable regulatory program, and these were primary goals of the Vice President's regulatory relief efforts. Such actions also serve to place the Administration in a needlessly negative light regarding environmental matters. As long as our Departments continue to "battle it out," this perception will continue.

It will not serve your purpose or mine to continue an eternal colloquy that only precludes issue resolution. It is imperative in the national interest that we meet to discuss revisions of the existing MOA to incorporate:

- A resource based elevation criterion. Protecting our national natural heritage is a matter of national significance that cannot continue to be ignored.

- Require decision review (elevation) at the request of the Assistant Secretary for Fish and Wildlife and Parks.

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- After the Notice of Intent to Issue, reinstate negotiations between the Field Supervisor/District Engineer and/or between the Regional Director/Division Engineer without extending the overall timeframe.

- Delete "threat" language requirement from the Service's Fish and Wildlife Coordination Act Report.

- Provide for termination and renegotiation of the MOA, by either party, with a 30-day notice.

In addition, we find Army's policy that mitigation is not required "over and above that offered by an applicant," as expressed in your October 30, 1984, letter, to be unacceptable. We must establish a mitigation/resource loss prevention strategy that is in conformance with the requirements of the Fish and Wildlife Coordination Act, NEPA and Corps' regulations. This strategy must define in specific terms the "equal consideration" requirement and its relationship to the regulatory program. It must make concrete what is now a vague concept.

Supporting documentation is enclosed.

Sincerely,

Ray

G. Ray Arnett
Assistant Secretary for Fish
and Wildlife and Parks

Enclosures

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EXHIBIT 20

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

DEC 17 1984

Mr. Robert K. Dawson
Acting Assistant Secretary of the Army
(Civil Works)
Department of the Army
Washington, D.C. 20310

Dear Bob:

I have reviewed your response of October 18, 1984, to my request for elevation of the decision of the District Engineer, Norfolk District, to issue permits for two dams in the Bush River Watershed, Virginia. Your letter essentially "brushes off" the concerns that I believe were carefully documented in my letter, and this is symptomatic of the lack of agreement we have regarding the procedures outlined in the 1982 Interdepartmental Memorandum of Agreement.

I disagree with your findings concerning all of the major points that were addressed in my letter of October 2, 1984. Regarding the information that was presented by the Environmental Protection Agency (EPA), it is incredulous that the District Engineer would dismiss a scientific report fully supported by an agency with expertise in the area of wetlands determination. Although the Fish and Wildlife Service (Service) did participate with the Soil Conservation Service (SCS) in an effort to inventory wetlands at the project sites, the inventories were conducted in 1980. The new inventory sponsored by EPA was conducted in 1983 and was much more detailed than the Service/SCS inventory. The District Engineer did not present an analysis of the EPA report that refutes its findings, and to our knowledge, the District Engineer did not ask if the Service agrees with EPA's findings. In fact, the Service fully supports the EPA report. Do you believe the District Engineer adequately considered the new information provided by EPA?

Regarding the issue of insufficient coordination, your response appears to contravene the intent of the Fish and Wildlife Coordination Act (FWCA). The intent of the FWCA is to provide that wildlife conservation receive equal consideration with other features of water-resource development programs. The FWCA clearly designates the Service as an agency with special expertise in the field of mitigation of project impacts to fish and wildlife resources. As you admitted, the District Engineer failed to fully coordinate with the Service and to accept the entirety of the Service's findings on mitigation. Furthermore, the District Engineer failed to justify in the Statement of Findings (SOF) the reasoning for dismissing the Service's recommendation. How can you support the District Engineer's actions in light of the requirements of the FWCA?

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The first policy issue that I raised was that of inadequate environmental documentation of the District Engineer's decision. It appears that you misunderstood this issue to mean decision documentation, addressed in my letter as the third policy matter. I maintain that the District Engineer's documentation of the fish and wildlife issues involved in the Bush River Watershed projects falls far short of the statutory and regulatory requirements mentioned in my October 2 letter. Your assertion that environmental documentation is not an area of expertise of the Service astounds me, and I refer you, again, to the FWCA. The Service has responsibility, by statute, in the area of determining environmental impacts of water-resource development projects. Although the Corps is guided, as are all agencies, in this issue by statutes and regulations, policy directives in the form of Regulatory Guidance Letters can direct the implementation of environmental documentation. From experiences with other permits such as Georgetown Refinery in South Carolina and Searsport in Maine, I feel that the Corps staff would benefit from new policy guidance in this area.

The second policy issue that I raised involves conditional approval of a future decision to allow water to fill the Site 12 reservoir. I asserted that the responsibilities of the District Engineer to evaluate the public interest balancing factors and of the Service to evaluate impacts of the project to fish and wildlife resources were being circumvented by the decision to provide for such a conditional approval. You stated that the potential for filling the dam was reflected in great detail throughout the record. I agree that the possibility of filling the reservoir was discussed at some length in the District Engineer's findings. However, the point that I was making, and that you failed to address, is that the conditional approval did not and cannot take into account the balancing factors related to project and natural resource conditions that may exist at the future date when the approval may be given. Environmental conditions change with time, and it is difficult to predict what impacts, either positive or negative, may occur due to filling the reservoir some four to ten years from now. We have no indication that the District Engineer made any attempt to project the future circumstances and analyze the potential impacts that might occur. This is not a question of the District Engineer's authority to condition a permit, Bob. The question is whether it should be a Corps policy to permit approval of a future action when the circumstances surrounding that action are presently unknown.

The third policy issue I addressed concerns the District Engineer's decision to reject, without factual documentation, some of the Service's recommendations for mitigation. Your assertion that the SOF is simply a summary of the decisionmaker's views on the issues is misleading, at best, and contravenes the spirit of cooperation between our two Departments regarding permit decisions. As you well know, the SOF is one of only three documents the Service normally receives from the Corps supporting its decision on a permit application. The other two documents received by the Service are, in this case, a Notice of Intent to Issue the permit, and an Environmental Assessment with its Finding of No Significant Impact. I hope you would agree that the factual basis supporting the District Engineer's decision should be stated concisely

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within those three documents. Otherwise, the Service and other interested parties would have to request from the Corps the entire documentation included in the Administrative Record in order to understand the basis for the Corps' decision. Don't you agree that this procedure would be cumbersome, time consuming, and contrary to the spirit of the regulatory reform effort?

In this particular case, Bob, I found nowhere in the supporting documentation the factual basis for the District Engineer's decision to reject some of the Service's advice on potential impacts to fish and wildlife resources and recommendations for mitigation measures. The District Engineer's findings contrary to Service advice are subjective in nature. I see this issue as a policy matter because implementation of Corps regulations on this topic is guided by policy statements such as the Regulatory Guidance Letter 84-9. Furthermore, I cannot believe that you would condone sloppy decisionmaking or the "short-changing" of commenting agencies by allowing such pitiful examples of decision documentation to see the light of day. This issue is of concern to me because I believe that your response could undermine the significance of the SOF and the cooperation that has developed between our two Departments.

Bob, I would like to find a way to resolve our wide divergence of opinions. Will you kindly review this letter and my letter of October 2, and provide a response that is "on target"?

Sincerely,

(Sgd) Ray

G. Ray Arnett
Assistant Secretary for Fish
and Wildlife and Parks

cc:
ES(6) FW ES/Files
Directorate Reading File
DO Chron AHR
Reading File
Regional Director (ARD-HR), Newton Corner, MA
Field Supervisor (ES), Annapolis, MD

FWS/ES:MZellhoefer:lml:11/13/84:343-8814:SN#1309 & SN#1235
ZELL2: BUSH RESPONSE

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EXHIBIT 21

THE SECRETARY OF THE INTERIOR
WASHINGTON

SEP 12 1984

Mr. J. Ron Brinson
President
American Association of Port Authorities
1612 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Brinson:

Thank you for your letter of July 26, 1984, regarding the efforts of the Department of the Interior to renegotiate its 1982 Memorandum of Agreement (MOA) with the Department of the Army addressing the Corps of Engineers (Corps) permit program.

The current MOA has been in effect for over two years now, and I believe that sufficient time has passed to evaluate its effects. For example, I was surprised to note that the 1982 MOA has resulted in a thirteenfold increase in elevations of permit decisions. Under the 1980 MOA, only 1.3 cases per year required resolution at the Washington Office level, while in the first year of the 1982 agreement, 15 cases required action by both Assistant Secretaries. This obvious discrepancy is one of the reasons I was prompted to request that the MOA be reconsidered. Other reasons are documented in the enclosed letter to Assistant Secretary Gianelli.

I understand your concern about possible changes in the permit decision timeframe provided in the current MOA, and I assure you that I have no intention of expanding that schedule. If you carefully review the enclosed proposed MOA, you will see that our recommended changes fit within the existing timeframes. Our recommendation is simply to provide for a discussion level between the Fish and Wildlife Service (Service) Regional Director and the Corps Division Engineer within the existing time period allotted to the Service for elevation of an unsatisfactory decision.

I believe that both regulatory relief and environmental protection can be achieved in the Corps permit program. The current MOA has taken a large step in the direction of regulatory relief by strictly circumscribing the timeframe for the elevation process. My wish is that changes in the MOA will bring environmental protection into balance with regulatory relief.

Sincerely,

Bill Clark

William Clark

Enclosures

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EXHIBIT 22

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DATE December 6, 1983

SUBJECT Status of EPA-COE 404(q) Memorandum of Agreement (MOA)

FROM Paul G. Keough, Deputy Regional Administrator
Region I

TO Josephine Cooper, Assistant Administrator
for External Affairs

This memorandum is to alert you to continuing difficulties experienced in Region I with implementation of the EPA-COE, July 7, 1982, 404(q) MOA. Of most immediate concern is the Department of Army's interpretation of paragraph 7b concerning agency comment letters. You may recall that we discussed this issue during your recent visit to Region I.

For purposes of the 404(q) MOA the Army has directed their Corps district and division offices to disregard comment letters which are not signed by the Regional Administrator. In Region I, as in other regions, initial comment letters are signed by other Agency representatives (usually the 404 coordinator or branch chief). Therefore, in cases where the Corps does not adopt EPA's recommendations we are not informed of their intent to issue the permit or given the opportunity to seek higher level review.

This has in fact occurred recently in two cases in Region I. The first case involved construction of a sewer outfall in a wetland where EPA recommended issuance of the permit provided it was conditioned to monitor the impact of the effluent on the marsh. The second case concerns a highway project where 11 acres of wetland would be filled and we recommended that mitigation for habitat losses be provided. In both cases the Corps did not adopt EPA's recommendations and in neither instance were we informed of the decision pursuant to the §404(q) MOA. This leaves EPA with the limited choice of doing nothing or initiating a §404(c) action.

[redacted] I fail to understand why they feel that the 404 program, over all the other environmental programs administered by EPA, requires the day-to-day supervision of the Regional Administrator. The Corps is well aware that initial recommendations to them are a routine programmatic activity; to personally involve the Regional Administrator in most of the 400-500 permit cases we review each year would create an unnecessary burden and decrease the likelihood of meeting the short review times allowed for most 404 public notices. Moreover, I do not understand why the Army is concerned about what is normally an internal management decision. (Initial comment letters should be distinguished from formal elevation requests; we have always agreed that the latter should be signed by the Regional Administrator.)

EPA Form 1320-6 (Rev. 3-76)

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Unless corrected, this problem will restrict our ability to effect environmentally sound decisions in the 404 permit process. We urge you to expedite resolution of this issue with the Army. Should a quick agreement not be possible, we believe EPA should exercise its option under paragraph 8 of the MOA to renegotiate the document. This should be done without delay provided EPA carefully explains the reasons for its action to the Army and the public. Indeed the MOA warrants renegotiation because of other problems which were discussed at the last national meeting of the 404 program personnel.

I appreciate your attention to this matter and Region I is ready to assist you or your staff as would be most appropriate. Should you need more information, feel free to contact me or Douglas Thompson of my staff at FTS 223-5470.

cc: Allan Hirsch, Director OFA
John Meagher, 404 Program Branch Chief
Rebecca Hanmer, Deputy AA for Water
Cathy Winer, Office of General Counsel
404 Program Coordinators, Region II-X

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EXHIBIT 23

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION V

DATE: DEC 23 1983

SUBJECT: Memo from Paul G. Keough, Acting Deputy Regional Administrator, Region I on Problems with the 404(q) Memorandum of Agreement

FROM: Charles H. Sutfin
Director, Water Division (5W)

TO: Alan Levin
Deputy Regional Administrator (5RA)

In response to your December 19, 1983, inquiry about the subject memo, we have experienced problems similar to those described by Mr. Keough. Fortunately, those problems have not yet resulted in any significant environmental impacts. However, indications are that we may not be so lucky in the future.

The problems arising from the 404(q) memorandum are primarily the result of the severe time constraints placed upon the USEPA in the review of proposed discharges. Those problems are, indeed, compounded by the Corps' unreasonable insistence that the USEPA's comments on proposed discharges be signed by Regional Administrators in order to be given any serious consideration. A brief review of Region V's situation may be helpful to you.

During FY'83, Region V reviewed about 1,250 applications for permits to discharge dredged or fill material. As part of the Corps' regulatory reform of the 404 Permit Program, they have reduced the comment period for such applications from 30 days to 15 or 20 days. Although most Corps District offices make an effort to deliver notices of permit applications to the Region by the start of the comment period, they are not always able to do so. In many cases, notices are not received until a week or more of the comment period has elapsed. Even in those cases where the notice is received at the start of the comment period, the amount of time in which to conduct a review is terribly short. As an example, we can look at what is involved in the review of a notice with a typical 20 day comment period. Since our comments must be received by the Corps by the close of the comment period, we generally must allow at least three days for delivery through the mail. In addition, the preparation of a draft comment letter, peer and supervisory review of the draft, and preparation of the final comment letter usually requires at least an additional three days. Finally, any given 20 day period will include at least six days that fall on weekends. Taken together, these three items account for 12 of the 20 days available for reviewing the project proposal, gathering additional information, coordinating with other Regional programs and other Federal and State agencies and, if necessary, conducting a field investigation of the project site. As you can imagine, it is not easy to accomplish all of this in an eight day period when reviewing a complicated project with the potential for significant environmental impacts.

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As stated previously, this problem is compounded when we are required to obtain the Regional Administrator's signature on the comment letter. Since it is undesireable for the USEPA to continually be late in submitting comments, and since completing reviews within the short comment period is already a continual and often disappointing struggle for us, we have decided to eliminate as many built-in delays as possible. This means curtailing the level of intra-and interagency coordination that we would like to conduct, utilizing electronic mail services whenever possible, and allowing the Section Chief to sign comment letters. Although this last measure forecloses any possibility of referring disputed matters to higher authority, the experience of other Regions indicates that such referrals are generally futile since the 404(q) MOA allows the Corps to arbitrarily refuse to discuss the matter.

It could be argued that the 404(q) MOA is designed in such a manner as to preclude the USEPA from having any meaningful involvement in the 404 Permit Program. Its restrictions on review times, extensions of comment periods, and the scope of the USEPA's review of proposed projects are unwarranted and detrimental to the goals and objectives of the Clean Water Act. In addition, the Corps' interpretation of the signature authority allowed under the MOA is an intrusion into the USEPA's internal operations. All in all, the MOA fails to serve the interest of the environment, the general public and, most certainly, of this Agency.

Since the 404(q) MOA was agreed to by this Agency over the unanimous opposition of the Regional Administrators, I see every reason for the Regions to continue to express their concern over its impact and its interpretation by the Corps. I strongly urge you to do so at every opportunity.

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EXHIBIT No. 24

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310

8 APR 1985

Honorable John H. Chafee
United States Senate
Washington, D. C. 20510

Dear Senator Chafee:

This is a follow up to our recent meeting on the 404 program. I look forward to providing information for the record which I believe will show that our regulatory reforms are sound and that we have not injured the program. In fact, the record to date shows an even greater sensitivity to the principles of the Clean Water Act than prior to regulatory reform. I look forward equally to having our critics come forward to specify and substantiate their claims. I would hope that attention can be focused as well on further reform that may be needed to fulfill the Reform Charter of the Presidential Task Force on Regulatory Relief.

more reform

This is not to question the legitimacy of concerns and questions about the reforms. When changes are made, particularly in an already controversial program, there are bound to be questions raised about whether the changes go too far or not far enough. Nor am I saying that our program is perfect. We stand willing to discuss improvements in a constructive fashion.

I did note a reference you made at our recent meeting to a letter Ray Arnett sent me in December. There are serious factual errors in that letter and many speculative, unsubstantiated conclusions. I am prepared to respond in detail to Mr. Arnett's concerns. Additionally, I have enclosed my response to several questions you asked.

Arnett letter

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I would like to stress that the bottom line of our regulatory reform is that we maintain the environmental standards of the program while providing permit applicants with a fair, balanced, and prompt response to their applications. I appreciate the opportunity to explain our efforts on these important matters, and I would like to stress our willingness to make adjustments when specific, real environmental problems can be identified.

Sincerely,

(Signed)

Robert K. Dawson
Acting Assistant Secretary of the Army
(Civil Works)

Enclosure

cc: SASG
SACW (File, read, signer)
DAEN-CWO-N
Document #304 (61,2)
KD/dw 29 March 85

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ENCLOSURE

Administrative changes made to date have been in the interest of good, efficient government and have not reduced the environmental protections contained in the Clean Water Act, the National Environmental Policy Act, and all the other environmental statutes which apply to this program. What has been done is to eliminate or reduce unnecessary, duplicative, and wasteful procedures. The substance of the program has been left intact and strengthened our role in accomplishing the goals of the Clean Water Act by being able to concentrate our staffing and funding in those areas where they will do the most good.

Regulatory reform has established the role of the Army as one of responsible and accountable leadership. That role has been accepted with all of its problems and criticisms. Excellent progress has been made in stabilizing and establishing a clear course for the program. The result is a program of balance and wise stewardship.

During FY 1984, the Corps received over 13,500 applications for permits so the program continues to have a major impact on the general public. The up-to-date statistics on processing only Section 404 or combined Sections 404 and 10 permit applications show, during FY 1984, the Corps of Engineers issued 5,859 individual permits and denied 346. This means that approximately 1 permit was denied for every 18 permits that were issued. The denial rate in FY 1983 was 1 in 19; in FY 1982 it was 1 in 28; and in FY 1981 it was 1 in 30. This illustrates that regulatory reform is not "dismantling" the program, but allowing us more time to review important or controversial permit applications, thereby making more informed permit decisions.

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Of the 346 permits that were denied during FY 1984, many were denied for more than one factor. A breakdown of the factors is as follows:

A.	Non-compliance with the 404(b)(1) guidelines	55
B.	Denial of State certifications (401 or CZM)	80
C.	Denial of other permits (e.g., State or local)	21
D.	Other public interest factors	32
E.	A combination of two or more factors from A-D above	158

Additionally, many of the issued permits were modified and/or conditioned. Corps field personnel conservatively estimate that over 50% of all proposals are altered through the regulatory process. Modifications typically result in a reduction in the project scope, a change in location, an alteration in construction methods, reduction of impacts, or mitigation. The most frequent reasons for requiring modifications include the lessening of environmental impacts or impacts to historic properties, and improved engineering or design. Mitigation, on the other hand, included a variety of types such as avoidance, revegetation, compensation, improvement of existing resources, timing restrictions on construction, and structural appurtenances such as intake screens and roadfill culverts.

A concern has been expressed for the issuance of permits for non-water-dependent activities. The term water dependency has not been clearly defined and for the most part, does not assist in the analysis of an application under Section 404. It often confuses the issues rather than promotes an objective analysis. The determination as to whether a bridge or a pipeline is water dependent does not alter the fact that bridges and pipelines must in many instances cross waters of the United States. As with the National Environmental Policy Act, the alternatives analysis is really the heart of the review under 404. In any case, as best can be counted, during FY 1984, approximately 1,200 permits were issued for non-water-dependent activities.

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The rationale for issuance generally recognized that there was a lack of practicable alternatives, that other alternatives were unreasonably costly, or that the other alternatives were more environmentally damaging. In other words, the permitted alternative represented the least environmentally damaging most practicable alternative for the project. Most non-water-dependent activities simply cannot avoid being in wetlands under some circumstances. Examples include cargo storage at port facilities, access fills and drilling pads for oil and gas, bridge construction, levees, water-based recreational housing, and road and pipeline construction.

A concern has also been expressed about 10-acre lakes particularly and nationwide permits in general. The nationwide permit for discharges upstream of the headwaters and into isolated waters was modified and reissued in the October 5, 1984, Final Rule in accordance with the settlement of NWF vs. Marsh. All parties in the lawsuit worked very hard and constructively to develop headwaters and isolated waters nationwide permits which would allow the program to be managed efficiently and effectively while maintaining necessary environmental controls. As an aside, the successful negotiations to settle the lawsuit demonstrate that when given a fair hearing and two-way communications, accord can be reached even on the most difficult issues.

The applicability of the headwaters and isolated waters nationwide permits has been modified in that it does not authorize discharges which would cause the loss or substantial adverse modification of 10 acres or more of waters of the United States including wetlands. Furthermore, for discharges which cause the loss or substantial adverse modification of 1 to 10 acres of such waters, including wetlands, notification to the district engineer is required.

Notifications pursuant to this nationwide permit must be in writing and include information such as location and description of the planned work. If the planned work falls within a class of activities or will occur in a category of waters which have been previously identified by a State or Federal resource agency as being of particular interest, or the district engineer believes that the discharge may otherwise be of importance to those agencies, he will afford them an opportunity to consider the notification and express their views.

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From October 1984 to December 1984, the Corps of Engineers received 44 notifications under the predischarge notification procedure. The procedure has resulted in seven projects requiring individual authorization. All agencies concurred that the remaining 37 projects did not need individual authorization.

The new procedure calls for Federal and State resources agencies to identify areas of special interest to them wherein the Corps will send them all predischarge notifications. Interest in specific classes of discharges or categories of waters has been expressed by State and Federal resource agencies to nine district and division offices. However, some agency offices have indicated they have a special interest in all areas no matter how small or how unimportant. Such a position results in extensive needless paperwork and delay with no attendant environmental gains and violates the spirit of the intended procedure. Two such requests have been revised to be more specific. The other requests are still under discussion between the Corps and the other Federal agencies. It is our intention to be responsive to those agencies' true needs keeping in mind that the areas in question have never before been regulated on a case-by-case basis. Hence, in considering the areas to review more closely, we must also remain sensitive to increasing the bureaucracy and to adding non-productive burdens and delays to the public.

Regarding enforcement, an effective regulatory program must have effective enforcement. Regulatory reform has done much to reduce the delays and uncertainties of the 404 program through the expansion of general permits and improvement in the permit processing time. This has had a positive effect on the public's willingness to comply voluntarily with the law and regulations and appears to have reduced the number of small violations that had been common earlier. Over 4,000 alleged violations are reported to the Corps districts each year. 28% of the violations involve only Section 10, while 72% are Section 404 or Section 10/404 combined. The majority of all violations (61%) involve private individuals. Today, the spirit of regulatory reform is being applied to 404 enforcement by our efforts to define and explain the need for permits and to take quick but reasonable actions to enforce that need as well as enforcing the conditions of issued permits. Many of the staff freed up by reform measures are being used to enhance enforcement efforts.

Finally, the interstate commerce nexus which triggers jurisdiction in isolated waters is being closely examined. There is no clear way to describe this connection and judicial rulings vary widely. Our best judgment and sensitivity to the goals of the Clean Water Act, will be used in determining whether an isolated water falls within Section 404 jurisdiction.

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EXHIBIT 25

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 25 1985

THE ADMINISTRATOR

Mr. A. Alan Hill
Chairman
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, D.C. 20006

Dear Chairman Hill:

On March 12, 1984 the U.S. Environmental Protection Agency (EPA), in accordance with our responsibilities under Section 309 of the Clean Air Act (CAA), commented on the U.S. Army Corps of Engineers' (Corps) proposal to revise its National Environmental Policy Act (NEPA) implementing regulations (33 CFR Part 230, Environmental Quality, Procedures for Implementing NEPA). EPA found that the proposal as written would have unacceptable effects on the quality of the environment. Pursuant to the Council on Environmental Quality's (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (40 CFR Part 1504, Predecision Referrals for the Council of proposed Federal Actions Determined to be Environmentally Unsatisfactory), our comment letter notified the Corps that, unless a satisfactory agreement was reached on the significant unresolved issues prior to the publication of the final regulation, it was a candidate for referral to the Council pursuant to the authority of the Administrator under Section 309 of CAA.

EPA has completed its review of the Department of the Army's proposed final rule, received by the Council on January 28, 1985. While some of our earlier concerns have been addressed, I have determined that major problems remain, and that the regulation would have unsatisfactory impacts on the quality of the environment.

In addition, these revisions would have an adverse effect on EPA's program to review significant environmental impacts of proposed Federal actions under Section 309 CAA, and to prevent unacceptable adverse effects of dredge and fill discharges under Section 404 of the Clean Water Act (CWA We believe that these changes would increase the likelihood of coordination problems between EPA and the Corps. We anticipate they would result in increased numbers of predecision referrals to the Council under Section 309 CAA, and will necessitate increased use of EPA's authorities for additional review of Corps regulatory decisions pursuant to Sections 404(q) and 404(c) of the Clean Water Act. An increase in the number of actions of this type is contrary to our regulatory reform objectives, as they will result in additional and avoidable delays and costs.

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EPA's efforts to resolve our concerns with the Department of the Army have not proven successful. Consequently, pursuant to 40 CFR Part 1504 I am referring this matter to the Council for resolution of the outstanding issues of concern between EPA and the Corps. Pursuant to 40 CFR 1504.3(c)(i) I am requesting that no action be taken to implement this regulation until the Council acts upon this referral. Enclosed is a statement, supported by factual evidence, leading to our conclusion that the matter is unsatisfactory, in accordance with 40 CFR Part 1504. (c)(2)(i)-(vi). Also enclosed is EPA's Office of General Counsel's memorandum addressing certain legal issues presented by the Corps' proposed changes to its NEPA regulations.

It is my desire and intent to achieve Administration regulatory reform and environmental objectives by securing an acceptable resolution of these issues.

Sincerely,

Lee M. Thomas

Enclosures

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Senator CHAFEE. I ask the Armed Services Committee to postpone action until we complete our hearings, should they continue longer than expected, which is not our intention, then you and I can confer and see what the next step might be.

Senator WARNER. The Chair wishes to inform the distinguished Senator that earlier today, Mr. Goldwater and, subsequently, Mr. Thurmond and, subsequently, myself have all granted this request. So, the interests of the distinguished chairman of your committee, yourself and others are fully protected.

May I make just one observation, and then maybe join you in a colloquy, the observation being that the President did nominate Mr. Dawson some time ago. The nomination has been pending for a considerable period, and therefore it is the responsibility of the Senate to adjudicate its own interests, out of respect to the President, this individual and his family.

So, I hope that we can resolve and come to a conclusion as to what the proper action is in the Senate so that we can advise our colleagues.

Senator CHAFEE. Thank you, Mr. Chairman. I want to make it clear that this is no reflection in any way on Mr. Dawson's character. I want that absolutely clear, that it is just a fundamental difference which I hope we can resolve on matters where there is a difference of opinion.

As far as Mr. Dawson's character, integrity or anything therewith, there is no imputation on that whatsoever and he has our respect as an individual, completely, so there is no problem there.

Senator WARNER. Well, I am sure, Senator that the views as expressed by yourself and others, and indeed these organizations with which I have extensive familiarity, will be carefully considered. As the Senator knows, he and I for many years, through a long friendship, have shared the outdoors on many occasions.

The colloquy I would like to discuss with you is, again, I have not gone into this case with the depth that you have. It seems to me that the nominee could well be caught between a rock and a hard ball. On the one hand you have the Presidential Task Force which has issued certain policy guidelines, and thus far it is my understanding that the nominee has followed these guidelines.

It is the opinion of some that the guidelines of that task force may well be in contravention of the law.

Senator CHAFEE. Mr. Chairman, let me just say that we have had three hearings with Mr. Dawson and the problem is trying to work out a memorandum of understanding which, as I say, EPA and the Fish and Wildlife Service are involved in. A memorandum of understanding on what seems to me to be a very fundamental and not very difficult agreement between these organizations.

Senator WARNER. You mean, the Government entities?

Senator CHAFEE. Yes, the Government entities, and we have not been able to resolve these. I can be corrected on this, but to the best of my judgment in the hearings that we have had on this. I have not heard Mr. Dawson say that his hands are tied, that he cannot proceed with this because of the regulatory reform rules that were handed down.

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I want to be completely fair to Mr. Dawson. I have never heard him say that, that is a problem. I think the problem as we see it is, Mr. Dawson has these views.

Senator WARNER. You mean, they are personal views?

Senator CHAFEE. Yes, to the extent that I can ascertain it, that he feels this is the way it has been pointed out to me that they make very clear that the environmental side is to be protected as well as the swiftness and ease of reaching decisions.

So, it is not a one-way street.

Senator WARNER. Perhaps the witness, having heard our exchange, might wish to make some comments.

Mr. DAWSON. Thank you, Mr. Chairman.

First of all, I would like to make very clear that I have appreciated Senator Chafee's posture on this entire matter. We have not always agreed, to say the least, but I have to say that he has always treated me with extreme fairness.

I feel, as far as the issue at hand, certainly the charter that we received in May 1982 which is a part of the public record, does in fact prescribe some very specific and very general regulatory reform. One of the issues which has been mentioned this morning is the negotiation of a new MCA.

One of the issues there is whether there is automatic elevation. That issue is very specifically proscribed in the Presidental Task Force on Regulatory Relief Charter. So, in fact, that is an issue. It is certainly not my approach to things when I am testifying before a committee to try to point the finger at the President or anyone else.

I do not disagree with the policies of this administration on this issue, and I do not feel that it is appropriate for me to seek shelter behind those policies, but rather to try and articulate as best I can—obviously, often inadequately—why we are pursuing those policies.

Senator CHAFEE. Mr. Chairman, I am not exactly sure that I understood Mr. Dawson's statement. It seems to me that if he is acting under certain directions, for example on the memorandum of understanding and the requirement that there be no elevation of these decisions, and they cannot agree to that and that is the law or the specific direction he is operating under, well, that would be important for us to know.

But in all fairness, I never heard Mr. Dawson raise that in these extensive hearings and I do not think he could be characterized as hiding behind somebody else's skirts. He could be, if he is acting under a specific directive that he has to carry out, but Mr. Dawson did not raise that point with us in the hearings so far.

Am I correct in that, Mr. Dawson, you have never raised that point?

Mr. DAWSON. Senator, I have certainly not sought actively to raise the point. I would hope that it has come out in the hearings that I have not been on a frolic of my own and acting independently on the policy issues that you and I have discussed at great length.

Notwithstanding——

Senator WARNER. I am going to interrupt the witness. I think we have to be specific here, because many persons are likely to review

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this record and at this time, or in an appropriate place in the record, I want to insert a document promulgated by the Office of the Vice President dated May 7, 1982, which purports to be certain guidelines for the conduct of the activities of your office.

Is that correct, Mr. Dawson?

Mr. DAWSON. Yes, sir.

[The information follows:]

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OFFICE OF THE VICE PRESIDENT
WASHINGTON

May 7, 1982

Honorable William R. Gianelli
Assistant Secretary of
the Army (Civil Works)
Department of the Army
Washington, D.C. 20510

Dear Bill:

I am transmitting with this letter the program of reforms to the Section 404/10 regulatory program developed for the Presidential Task Force on Regulatory Relief and approved by the Task Force. As the leader of the group that evaluated the problems of the Section 404/10 program and recommended major changes to the Task Force, you are to be congratulated for a solid start on one of the Administration's most important regulatory relief efforts.

As you know better than anyone, however, the most important work still lies ahead, in implementing the ambitious regulatory and administrative changes described in the enclosed document. Since many of these changes involve agencies other than the Corps of Engineers, you should continue your interagency leadership role during the implementation phase. While the Task Force expects other agencies to take the initiative in instituting prompt and appropriate program changes consistent with the policies described here, we will rely on you to coordinate overall implementation and to keep the Task Force informed of progress and any problems that should arise.

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I wish to thank you and the other members of your working group for the dedicated effort that has completed the first phase of this project so successfully. I am confident that, under your leadership, the implementation phase will meet with equal success--reducing substantially the burdens and uncertainties that have beset the Section 404/10 program without compromising its important environmental protections. You can be assured of the full support of the Task Force in carrying out this vital regulatory reform.

Sincerely,

Christopher DeMuth
Executive Director
Presidential Task Force on
Regulatory Relief

Enclosure

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ADMINISTRATIVE REFORMS TO THE
REGULATORY PROGRAM UNDER SECTION 404
OF THE CLEAN WATER ACT
AND SECTION 10 OF THE RIVERS AND HARBORS ACT

I. Reducing Uncertainty and Delay

A. The United States Army Corps of Engineers operates the Section 404 and Section 10 permit programs under Memoranda of Agreement with several other federal agencies that have responsibility for commenting to the Corps about the environmental, wildlife, and other aspects of proposed dredging or filling operations. These Memoranda provide for four layers of automatic review or "elevations" of individual permit decisions whenever a commenting agency disagrees with the approach adopted by the Corps. The review process has introduced long delays into a substantial number of major permit applications. It has also been used to blur authority and accountability for final permit decisions, which by statute belong with the Army. These aspects of the program run directly counter to the language of Section 404, which directs that the purpose of the Memoranda of Agreement is to "minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits" (404(q)), and which does not authorize "appeals" of Corps decisions among federal agencies.

To cure these problems and return the program to the expeditious procedures required by Congress, the Department of the Army and the commenting agencies will prepare new Memoranda of Agreement no later than two months from today providing that:

1. The final permit decision will be made by the District Engineer in the vast majority of cases.

2. The necessity for reopening the record of a case developed by the District Engineer will be minimized.

3. Once the District Engineer gives notice of his intent to issue a permit, his decision will be reviewed only upon the recommendation of the Administrator or Deputy Administrator of the Environmental Protection Agency, the Assistant Secretary of the Interior for Fish and Wildlife and Parks, or the Administrator of the National Oceanic and Atmospheric Administration. Reviews will be limited to cases of insufficient interagency coordination at the District level, the development of significant new information, or the necessity for policy-level review of issues of national importance within the authority of the agency recommending review.

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4. Recommendations for review must be made within 15 working days of the District Engineer's notice of intent to issue a permit. Upon receipt of a recommendation for review, the Assistant Secretary of the Army (Civil Works) must decide whether or not to concur within an additional 15 working days. If he does not concur, the District Engineer's decision will be the final decision. If he does concur, he will also determine whether the review and final decision will be made by the Division Engineer, the Chief of Engineers, or by himself; the record of the District Engineer's decision will then be forwarded to the reviewing official within 10, 20, or 30 working days, respectively. In the vast majority of cases the entire review process should be completed within 90 calendar days of the District Engineer's notice of intent to issue a permit; in no case should the review process exceed 120 calendar days.

5. Requests for extensions of time in the basic public comment period from commenting agencies must be made in writing by the Regional Director or Regional Administrator and must demonstrate the need for additional data which could not have been collected during the original period. Time extensions for any individual permit may not exceed 30 days.

6. The Memoranda of Agreement with the Departments of Agriculture and Transportation will provide that the Corps will accept to the extent legally appropriate the environmental documentation and decisions made under the regulations of these departments. Provision should be made for DOT and DOA to elevate a permit action to the ASA(CW) in a similar way to that outlined in paragraphs 3 and 4 above when the District Engineer proposes, contrary to the view of DOT or DOA, to deny a permit on a DOT or DOA project.

7. The Memoranda of Agreement will apply only to permit applications under Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection Research and Sanctuaries Act (except for compliance with ocean dumping criteria). They will not be used for review of permits for which an exemption has been sought under the Endangered Species Act or for those which have a separate review mechanism.

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B. The Army will also revise its own regulations to reduce substantially the time it currently takes to prepare Environmental Impact Statements and other documents required by the National Environmental Policy Act. Furthermore, the Army will take steps to reduce or eliminate delays caused by investigations and other procedures required under the National Historic Preservation Act. Finally, the Army will revise the application process to ensure that only the minimum necessary information is received at the outset, to clarify what is required of applicants, and to limit requests for additional information to that essential for a complete record of the decision.

C. The Army will adopt as soon as practicable administrative measures to reduce the average time for obtaining a decision on a permit application. Strict time limits on the Corps' in-house procedures will be set so that, apart from requirements or procedures mandated by law, a decision on a completed application will ordinarily be forthcoming within 60 days of its receipt. An internal monitoring system will be established to ensure that these time limits are strictly observed. These measures will demonstrate the Army's resolve to demand no less from itself than from other agencies to speed up the Section 404 process. The Army will also consider other measures to reduce the delays to which the program has been prone.

II. Giving the States More Authority and Responsibility

A. The Army will proceed promptly to evaluate existing state programs and to issue general permits for particular categories on a state-wide basis, with appropriate safeguards, in those states whose programs are substantially similar to the Army's regulatory program.

B. The Army will not override decisions made by state and local governments on such matters as zoning or land use, unless water quality, navigation, or other issues of national importance are involved.

C. The EPA will revise its regulations under Section 404(g)-(l) to provide increased incentives and simplified procedures for state assumption of the Section 404 program. Once a state has assumed the program, federal oversight will be kept to the minimum consistent with statutory obligations and considerations of national importance.

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III. Reducing Conflicting and Overlapping Policies

A. Recognizing that the Section 404 program will greatly benefit from improved operational controls and reduced jurisdictional conflicts, the Army will:

1. Revise its regulations to reduce the time needed for state action on certification requests to the greatest extent reasonably possible.

2. Review those regulations which affect the Army's Section 404 activities and which impede implementation of the reform measures described herein, and develop proposals to correct the identified deficiencies.

B. The EPA's Section 404(b)(1) guidelines will be shortened, simplified, and made consistent with the reform measures described herein.

IV. Expanding Use of General Permits

The Army will expand the use of general permits on a regional and national basis as quickly as possible, both to minimize delay and paperwork and to eliminate duplication with other federal programs. The Army will vigorously pursue the concept of "state program general permits" for appropriate categories in recognition of states' ongoing efforts to protect environmental quality.

V. Clarifying the Scope of the Permit Program

The Section 404 program has been plagued by uncertainties over its jurisdictional scope. Individuals planning construction, exploration, or development projects in the vicinity of bodies of water have frequently been uncertain whether a Section 404 permit was required, and have sometimes been required to obtain permits or modify projects after they had begun or completed them.

The Administration is strongly committed to protecting the nation's important wetlands. However, a proper regard for Congressional intent and sound administrative practice requires recognition that the purpose of Section 404 is not to restrict development of certain types of land as such, but rather "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." While Congress' definition goes beyond the traditional definition of "navigable waters" covered by earlier Corps regulatory programs, it also does not encompass all biological "wetlands" however defined or regardless of their connection to waters.

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The current administrative definitions of the jurisdiction of the Section 404 program, contained in regulations of the EPA and the Corps, need to be clarified to provide better guidance to private parties and the Corps' own District Engineers. EPA and the Army, in consultation with other expert agencies, will develop new and more specific criteria redefining the scope of the program, based upon technical parameters and specifying which types of wetlands are and are not appropriately covered by the Clean Water Act. The purpose of the new criteria will be to introduce a reasonable degree of certainty into the scope of the Section 404 regulatory program and to maintain essential protection of the chemical, physical, and biological integrity of the Nation's waters.

VI. Review of Administrative Reforms

All regulations, guidelines, and Memoranda of Agreement under this reform program will be submitted to the Office of Management and Budget for review under Executive Order 12291 for consistency with the principles set forth in that Order, the policies set forth in the relevant statutes, and the administration's resolve to streamline and simplify the Section 404 regulatory program. The New Memoranda of Agreement will be submitted to OMB for approval within 60 days after the announcement of these regulatory reforms.

* * * * * * * * *

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FACT SHEET

The U.S. Army Corps of Engineers'
Section 10/404 Regulatory Program

- The Federal Water Pollution Control Act Amendments of 1972 as amended by the Clean Water Act of 1977 were enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 404 of the Clean Water Act authorizes the Secretary of the Army, acting through the Chief of the U.S. Army Corps of Engineers, to issue permits for the discharge of dredged or fill material into the waters of the United States, applying guidelines developed by the Administrator of the Environmental Protection Agency in conjunction with the Secretary of the Army..

- The Army Corps of Engineers administers Section 404 as part of its regulatory permit program, which also includes Section 10 of the Rivers and Harbors Act of 1899 and Section 103 of the Marine Protection, Research and Santuaries Act. Section 404 expanded the Corps' regulatory program from traditional navigable waters (for which Section 10 permits were also required) to "waters of the United States," which have been construed by some to encompass practically all waters and wetlands.

- Over 100,000 actions are annually affected by the Corps' regulatory program. As allowed by the Act, the Corps has issued "general permits" which do not ordinarily require individual processing. About 90,000 actions annually are covered under general permits. The total number of permits processed individually in one year under Sections 10, 10/404, and 404 is about 18,000. Of these, 43 percent are for Section 10 permits, 40 percent are for Section 10/404 permits, and 17 percent are for Section 404 permits.

- The Act calls for minimization of duplication, needless paperwork, and delays in issuance of permits, and sets a target of ninety days for a decision on an application. For this purpose, the Secretary of the Army is required to develop agreements with heads of other agencies, such as EPA and the Departments of Interior and Commerce, which have statutory responsibilities for advising the Corps about environmental, wildlife, and other impacts of permit applications.

- The Section 404 program has been plagued by severe delays that have generated complaints and imposed heavy economic burdens on the public. Despite recent improvements, average processing time for "delayed" (processing time greater than 120 days) permit actions was 315 days for applications requiring Environmental Impact Statements (EIS), and 270 days

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for those not requiring an EIS. Roughly 3 of every 10 permit actions are delayed and 1 percent of those delayed require an EIS. Based upon the number of permit aplications experiencing processing time longer than 120 days, the total cost of delays has been estimated on a very rough basis by the Corps to be in excess of $1.5 billion annually.

- A significant part of the delay experienced in the program has resulted from the time extensions frequently requested by commenting agencies and the complex "elevation" process for dispute resolution permitted by the Memoranda of Agreement. An agency that is dissatisfied with a decision of the Corps District Engineer can have the case elevated for reconsideration through four successive decision levels. Furthermore, the threat of elevation, with its concommitant delay in reaching a decision, has often caused applicants to accede to unnecessary and unreasonable changes in their plans. Since March 24, 1980, there were 281 cases where the District Engineer proposed to issue a permit over the objection of another federal agency. Of these, 211 cases were not elevated. Of the remaining 70 cases, 55 were resolved by the Division Engineer, for an average delay time of 150 days. An additional 5 cases are still pending at this level. Five cases were resolved by the Office of the Chief of Engineer, for an average delay time of 320 days. The remaining five cases were resolved by the Assistant Secretary of the Army (Civil Works), for an average delay time of 650 days. Of those 70 cases, 26 elevations were requested by the National Marine Fisheries Service (NMFS), 50 by the U.S. Fish and Wildlife Service (FWS) and 16 by the EPA (an elevation request is sometimes made by more than one agency). The average delay resulting from elevation for these cases was 202 days. The Corps has also estimated that the threat of elevation affected about 1700 other cases, causing an average delay of 75 days.

- Two illustrative cases of delays in the Section 404 program are provided at the end of this fact sheet. The first illustrates the kinds of complications that can arise from several layers of reviews involving different agencies. The second illustrates that long delays have occured even over relatively minor issues.

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- The Act contemplates that the states will eventually administer their own dredge and fill permitting programs. It therefore sets out conditions and procedures whereby EPA will approve transfer of authority to such states. These transfer provisions (Section 404(g) thru (l)) and the EPA's implementing regulations are extremely complex and give the states minimal incentives for assuming permitting authority. As yet no state has assumed such authority, although to varying degrees they do administer their own water resource management programs.

- In administering its regulatory program, the Corps is subject to a large number of statutory, executive, and regulatory constraints requiring extensive documentation. These constraints include EPA's detailed guidelines under Section 404(b)(1), EPA's veto authority under Section 404(c), state authority to regulate discharges in navigable waters within their jurisdiction under Section 404(t), state authority to issue water quality certification under Section 401, and coordination with other federal agencies such as FWS, NMFS, EPA, and the Advisory Council on Historic Preservation (and their state counterparts). The NEPA process and Executive Order 11988 on flood plains also apply to the Army's program.

- The Act does not define "waters of the United States" in operational terms. However, it has been interpreted in the broadest possible terms so that considerable uncertainty and difficulty have arisen concerning the extent of the Corps' jurisdiction. This has led over the past decade to several attempts at more precise jurisdictional delineation, both statutory and regulatory, as well as to considerable litigation. Currently, the term is defined by regulation to cover all traditional navigable and interstate waters, their tributaries, and their adjacent wetlands, including such areas as prairie potholes, isolated lakes, and intermittent streams. The Corps has estimated that the area of wetlands that could be associated with its program amounts to hundreds of millions of acres. The process of clarifying precisely what types of bodies of "water" are included in the Section 404 program is still continuing, even though the primary purpose of the Act--protecting the chemical, physical and biological integrity of the Nation's waters--is not in dispute.

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- In August 1981, the Presidential Task Force on Regulatory Relief designated the Section 404 regulatory program for review. The administrative and regulatory reforms announced today are based upon the recommendations of an interagency working group, chaired by the Department of the Army and consisting of the Department of Interior, the Department of Commerce, the Environmental Protection Agency, and the Office of Management and Budget. In developing its recommendations, the working group received helpful suggestions and information from government agencies and several state officials and private citizens and organizations. Both the administrative and the regulatory reforms are scheduled to be implemented over the next 2-6 months. The Corps expects that these reforms, when fully in place, will reduce significantly the number of permit applications likely to experience significant delays. They can be translated, roughly, into a cost savings in excess of $1 billion annually, based on the estimated cost of current permit delays of more than $1.5 billion.

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CASE SUMMARY NO. 1

LAKE ALMA PERMIT

The Lake Alma project was originally part of a Department of Housing and Urban Development grant to construct a public reservoir to help satisfy water-oriented recreation needs of the City of Alma and Bacon County, Georgia, and to stimulate economic growth in the region.

On October 4, 1977, the City of Alma and Bacon County Commissioners applied for an Army Section 404 permit. The application called for the construction of an earthen dam to create a 1,400 acre recreation lake on Hurricane Creek.

EPA and the US Fish and Wildlife Service objected to issuing the permit on the ground that the project did not justify elimination of approximately 1,400 acres of wetlands and that quality of the lake water would be unacceptable for recreational uses. The Georgia Department of Natural Resources supported the project citing the relative low quality of the existing wetlands; the Environmental Protection Division of DNR stated that water quality in the proposed lake would meet or exceed all applicable water quality standards for recreational waters.

The FWS conducted an evaluation of the project and submitted a mitigation plan which included a provision that the applicants purchase and manage additional acreage to offset the loss of wildlife habitat. Following acceptance of the mitigation plan by the applicants, FWS withdrew its objection.

The mitigation plan included a group of six small artificial lakes (green tree reservoirs, comprising a total of 194 acres) to be constructed and managed for wildlife habitat. EPA then added to its objection the concern that the green tree reservoirs would be detrimental to water quality. EPA continued its objection to the project as it was elevated through the Division Engineer and the Chief of Engineers to the Assistant Secretary of the Army for Civil Works, with each level trying to resolve EPA's concerns. When the ASA(CW) received the report in August 1981, he consulted with EPA and called for a restudy of the green tree reserviors. Upon completion of the study, the ASA(CW) directed the issuance of the permit. In September 1981 he transmitted his decision to the EPA Administrator who could have, but did not, elevate the matter to the Secretary of the Army.

The permit was finally issued on November 10, 1981, four years after the application.

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CASE SUMMARY NO. 2

CAMERON CONSTRUCTION COMPANY

On June 19, 1979 the Cameron Construction Company applied for a Corps permit to convert 10 acres of marsh along a navigation channel to a water oriented commercial use. The proposed project would allow Cameron Construction to expand its operations in Cameron, Louisiana, to meet the increased needs of energy producers. The proposed site is near Cameron Construction's existing facility and would require the placement of fill material over the 10 acres and construction of a 614-foot long bulkhead.

The National Marine Fisheries Service, part of the Department of Commerce, objected to the permit on the grounds that the project would have significant adverse consequences on important marine resources and that there were other viable alternatives. The Corps of Engineers disagreed with NMFS and proposed to issue the permit. Subsequently, in accordance with the 404(q) Memorandum of Agreement, NMFS elevated the issue to the Division Engineer and then to the Chief of Engineers. At each level, the Corps weighed all factors, including the concerns of NMFS, and found that the public interest was best served by issuing the permit.

On February 2, 1981, the matter was elevated to the Assistant Secretary of the Army for Civil Works. After evaluating all aspects of the issue, the ASA(CW) found that, although the 10 acres of wetlands would be lost, this only represented five ten-thousandths of one percent of the total wetlands in the area and that the benefits to be gained from the project were considerable. Further, he found that the Corps had adequately evaluated eight alternatives to the proposed action and had found that none of them offered signlficant advantages over the proposal.

In April 1981, the ASA(CW) decided that it was in the public interest to issue the permit and directed the Corps of Engineers to do so. The permit was issued on June 20, 1981, two years after the application.

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Senator WARNER. Is it your response that you have followed these guidelines?

Mr. DAWSON. Absolutely, yes, sir.

Senator WARNER. And do I understand that in following these guidelines you may have incurred the disapproval of a variety of persons, among them perhaps being some Members of the U.S. Senate, is that correct?

Mr. DAWSON. I would say that is a correct statement, yes, sir.

Senator WARNER. Now, we have isolated wherein some of the problem is, and the record will reflect that. I do not presume to know the contents of this but it bears reading.

Senator CHAFEE. Fine. I think that this is the document that we were discussing earlier. I think you will find in here that the requirement with respect to the environmental consequences of the actions must also be taken into account.

Mr. DAWSON. That is correct, Senator.

Senator CHAFEE. What we are saying is that the tilt is all in one direction.

Senator WARNER. In other words, if I may interrupt, Senator, in the exercise of a latitude of discretion the nominee has under these policy guidelines, it is the view of some that he has not accorded a proper balance between the various interests.

Senator CHAFEE. One of which is the environmental side, and indeed this is not just something that has come from this Senator. There is a very tough letter addressed to Mr. Dawson by Mr. Ray Arnett who is the Assistant Secretary of Interior for Fish and Wildlife.

Senator WARNER. At this time that will be entered in the record.

[The information follows:]

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, November 7, 1984.

Mr. ROBERT K. DAWSON,
Acting Assistant Secretary of the Army (Civil Works), Department of the Army, Washington, DC.

DEAR BOB: For nearly two and a half years, our Departments have been involved in an exchange of views relative to the Department of the Army's (Army) implementation of our interdepartmental Memorandum of Agreement (MOA). It is now abundantly clear that further correspondence on this issue is pointless and that Army's regulatory program is so flawed, it is no longer a usable tool to adequately protect wetlands.

In response to your August 30, 1984, letter, the proposals I have made relating to modifying the MOA are necessary; are supported by the accompanying data; do not extend the existing permit review timeframe, and are consistent with the Vice President's regulatory relief program. Unfortunately, they were rejected by your Office. As of this writing, Army's refusal to incorporate Fish and Wildlife Service (Service) proposals in those permits I requested be elevated has resulted in a direct loss or degradation of over 69,000 acres of wetlands. That total could have been avoided or significantly reduced had Army followed the Service's recommendations.

Furthermore, of the 23 permits for which elevation was requested but rejected by Army, four have resulted in lawsuits and four have resulted in Section 404(c) actions based on environmental grounds. This hardly results in a streamlined, timely, or predictable regulatory program, and these were primary goals of the Vice President's regulatory relief efforts. Such actions also serve to place the Administration in a needlessly negative light regarding environmental matters. As long as our Departments continue to "battle it out," this perception will continue.

It will not serve your purpose or mine to continue an eternal colloquy that only precludes issue resolution. It is imperative in the national interest that we meet to discuss revisions of the existing MOA to incorporate:

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A resource based elevation criterion. Protecting our national natural heritage is a matter of national significance that cannot continue to be ignored.

Require decision review (elevation) at the request of the Assistant Secretary for Fish and Wildlife and Parks.

After the Notice of Intent to Issue, reinstate negotiations between the Field Supervisor/District Engineer and/or between the Regional Director/Division engineer without extending the overall timeframe.

Delete "threat" language requirement from the Service's Fish and Wildlife Coordination Act Report.

Provide for termination and renegotiation of the MOA, by either party, with a 30-day notice.

In addition, we find Army's policy that mitigation is not required "over and above that offered by an applicant," as expressed in your October 30, 1984, letter, to be unacceptable. We must establish a mitigation/resource loss prevention strategy that is in conformance with the requirements of the Fish and Wildlife Coordination Act, NEPA, and Corps' regulations. This strategy must define in specific terms the "equal consideration" requirement and its relationship to the regulatory program. It must make concrete what is now a vague concept.

Supporting documentation is enclosed.

Sincerely,

G. RAY ARNETT,
Assistant Secretary for Fish
and Wildlife and Parks

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DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103

17 SEP 1985

Honorable Barry Goldwater
Chairman
Armed Services Committee
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

Thank you for the opportunity to appear before the Senate Armed Services Committee on September 12, 1985, to testify in my confirmation hearing.

During that hearing, I promised to provide two documents, the Presidential Task Force Charter on Regulatory Relief of the Section 404 program, and my response to letters from Mr. G. Ray Arnett, Assistant Secretary for Fish and Wildlife and Parks, Department of Interior. Copies of each are enclosed.

These documents are provided to give specific information on the content of the 1982 Memoranda of Agreement (MOA) and my comments on Mr. Arnett's letters. The Task Force Charter specifically states that automatic elevation be replaced by the mechanism in the 1982 MOA's (Task Force Charter paragraphs I.A.3 and I.A.4). The Task Force Charter also specifically lists the reasons for elevation as found in the 1982 MOA's. My responses to Mr. Arnett's letters indicate that the allegations made were based on erroneous information.

If I can provide any further information, please let me know.

Sincerely,

(Signed)

Robert K. Dawson
for Acting Assistant Secretary of the Army
(Civil Works)

Enclosures

Donald L. Dillon
Deputy for Policy, Plng. &
Legis. Affairs
OASA (Civil Works)

cc: SASG
SACW (File, Read, Sign)
Document #45, 61,1
JS:tr/dw 9/16/85

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Mr. J. Craig Potter
Acting Assistant Secretary for
Fish and Wildlife and Parks
Department of the Interior
Washington, D.C. 20240

Dear Mr. Potter:

Enclosed are draft analyses of Ray's letters of November 7, 1984 and December 17, 1984. I emphasize that they are draft because I want to avoid open disputes. We together may want to formalize our response later.

I suggest an agenda for our meeting Thursday as follows:

1. Role of FWS in commenting on Corps actions.

2. Corps responsibilities in documenting regulatory decisions.

3. Limits on interagency negotiations imposed by the Administrative Procedures Act.

4. Means of involving the public and other Administration agencies in policy determinations.

Sincerely,

Robert K. Dawson
Acting Assistant Secretary of the Army
(Civil Works)

Enclosures (#62 | #51)

cc: SASG
SACW (File, read, signer)
DAEN-CWO-N
Document #92 (61,2)
MR/dw 17 April 85

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DISCUSSION OF ISSUES RAISED IN
MR. ARNETT'S LETTER OF NOVEMBER 7, 1984

1. Charge - Army's program is so flawed, it is no longer a usable tool to adequately protect wetlands.

Response - This is a very serious charge. With such a wide and diversified program, it is likely that mistakes will occur occasionally. We will guard against those as best we can, but we must be careful in a program-wide analysis to focus on the overall effectiveness of the program and not be swayed to precipitous action by a few aberrant cases. To charge that a program is so seriously flawed as to render it useless creates a relatively high burden of proof which has not been met. The following discussion will show that the specific charges are virtually unsupported. Such a conclusion highlights the real problem with regulatory reform. People who oppose it on a philosophical basis continue to make broad and serious charges, but when asked to note some specifics which would support those charges, either there are none or the specifics presented prove on close examination to be groundless.

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2. Charge - Army's refusal to incorporate Fish and Wildlife Service (FWS) proposals in those permits (requested for elevation) has resulted in a direct loss or degradation of over 69,000 acres of wetlands. That total could have been avoided or significantly reduced had Army followed the Service's recommendations.

Response - The backup material provided with the Arnett letter indicates that the actual wetland losses amount to no more than 7,000 acres. Of those 7,000 acres, nearly 5,000 acres were subject of lawsuits where the Corps position was fully upheld. The remaining 2,000 acres was for a local flood protection project which was supported by all local and State agencies and officials. There were actually fewer than 500 acres which were yielded to what is considered to be typical development. A breakdown is as follows:

Project	Alleged Wetland Loss
Mississippi River - 229	176 acres
McDermott	245 acres
Mississippi River - 233	120 acres
Timber Properties	8 acres
J.D. Alexander	325 acres

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St. Mary's River	170 acres
Tensas Delta Land Co.	2,800 acres
Patten, Boyte, Evans	1,100 acres
City of Homer	88 acres
Carolina Refining	60,000 acres
City of Chesapeake	2,027 acres
Reeves, Maybank	1,500 acres
Searsport	106 acres
Bush River	618 acres
TOTAL	69,283 acres

Of the 69,300 acres claimed to be lost or degraded, 60,000 of those are attributed to degradation of wetlands as a result of potential oil spills in the Carolina Refining case. That permit was denied as a result of the MOA process. It is difficult to understand how FWS can claim failure of the MOA when fully 60,000 acres of the 69,000 acres of alleged wetland impacts are non-existent. The permit action in question was decided in exactly the fashion they recommended. Another 2,258 acres have not been authorized and may never be (Reeves, Maybank, St. Mary's, and Bush River).

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Another interesting statistic provided by DOI is the clearing of 4,776 acres of forested wetlands. Five of the specific clearing projects accounted for 4,225 acres. These actions were the subject of lawsuits by the Louisiana Wildlife Federation raising the very same arguments made by the FWS. The Corps was ably defended by the Department of Justice (DOJ). The district court upheld the Corps position on all counts. It is a simple matter of the FWS being at odds with the views of Federal district court and DOJ. Again, it is difficult to rationalize the failure of the MOA in situations which have been fully upheld by DOJ and fully adjucated by the Federal courts. The remaining 551 acres of cleared forested wetlands had the same factors involved and we believe confidently that had lawsuits been filed, they would also withstand close judicial scrutiny and be upheld. In addition, losses of 106 acres were attributed to the Searsport case which action was also upheld in Federal district court.

FWS claims 170 acres in the St. Mary's case. However, based on FWS concerns raised through the Corps review process, the Soil Conservation Service (SCS), who is the Federal agency sponsoring the project, withdrew the application. Again, the impacts are non-existent, yet are being touted as a failure of the MOA.

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Comparing 69,000 acres of losses charged in the Arnett letter with less than 500 acres actually yielded to development -- less than 1% of what was alleged -- certainly casts very serious doubt as to the validity of DOI's charges.

3. Charge - Four permits for which elevation was requested resulted in lawsuits, ... this hardly results in a streamlined, timely, and predicatable regulatory program.

Response - Federal courts fully upheld Corps actions in all the lawsuits. The fact that a lawsuit is filed is no measure of success or failure of a program. The measure of success is the outcome of the suits, i.e., whether the Corps is acting in accordance with laws and regulations. Further, we have a different view of whether the elevation requests were rejected in the first place. Three of the four requests for elevation involved conversion of bottomland hardwoods for agricultural purposes. FWS acknowledged that the impacts of the proposed projects were not significant in themselves. However, they raised concerns that the cumulative effects of continued conversions could be significant. We agreed. We chose to resolve the issue by establishing an interagency Blue Ribbon Panel to address programmatic solutions to the cumulative effects

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issue. However, we did not penalize a few individual property owners by denying permits because Federal policies and programs had not properly addressed the issue. It is curious to note that DOI declined for many months to participate in interagency discussions directed at resolving the issue.

Finally, after months of repeated requests, DOI did assign a representative to the Panel. The results of the panel are now being used by EPA in its nationwide study of bottomland hardwood conversions. We would suggest that the MOA process did work in a positive fashion. FWS identified a potential long-term problem area, Army agreed and responded by convening a panel of experts who analyzed the problem and reported results of the analysis to EPA for its use in developing a national strategy to deal with the issue. One would have difficulty rationalizing a charge that the system had failed, yet FWS continues to do so.

Still further, DOI levels serious and broad programmatic criticism based on literally a handful of cases. However, the Corps handles about 15,000 cases annually. Reaching conclusions about an entire program based on a hand-picked sample of literally one-tenth of one percent is hardly an objective or valid method of program analysis, especially when full analysis shows that the criticism is largely unsupported by the examples cited.

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4. Charge - Four cases have resulted in 404(c) actions.

Response - Four actions seem hardly an unreasonable number out of the tens of thousands of cases considered. Further, of these four, only one 404(c) veto has been exercized. The other three are pending. Whether EPA decides to veto those others remains to be seen.

5. Charge - Army's policy on mitigation is unacceptable.

Response - Army's policy was adopted through the rulemaking process and full public comment. The relationship between the public interest review and the appropriate amount of mitigation was the subject of lengthy negotiations in a recent lawsuit with 16 environmental groups. EPA staff lawyers drafted the policy. It was modified through negotiations with the plaintiffs, published for comment in the Federal Register, and adopted as a final rule in compliance with the settlement of the lawsuit. It is curious for DOI to assert that a policy so laboriously arrived at with so many parties involved is unacceptable.

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DISCUSSION OF ISSUES RAISED IN
MR. ARNETT'S LETTER OF DECEMBER 17, 1984

1. DOI Concern - ASA(CW) letter of October 18, 1984, "brushes off" carefully documented concerns of DOI's October 2, 1984, letter.

   ASA(CW) and staff reviewed every document provided by DOI and by the Corps. Each issue raised by DOI was specifically addressed in ASA(CW)'s response and a rationale was provided. Since multiple issues were raised, it was not realistic to go into detailed issue papers on each. The responses were fully as detailed as the charges.

2. DOI Concern - DOI is incredulous that the District Engineer (DE) would dismiss a scientific report furnished by EPA.

   ASA(CW) letter of October 18, 1984, states that the report was not dismissed and, in fact, was fully considered. The letter notes that the report was discussed specifically in several places in the DE's Statement of Findings (SOF). The DE determined that the report was at variance with information provided by experts from two other Federal agencies. In considering all information available to him, the DE was more persuaded by information from the other experts. The statement in Mr. Arnett's letter that FWS supports the EPA report is the first time the FWS position is so stated. Until that time, the record indicated that FWS supported the information provided by the Soil Conservation Service.

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3. DOI Concern - The DE failed to coordinate fully with FWS and to accept the entirety of the Service's findings on mitigation.

ASA(CW) noted that FWS had full opportunity to review and comment on all project plans and mitigation proposals prior to the DE reaching any decisions. FWS did comment and those comments were given full and fair consideration. DOI's concerns appear to be not with their opportunity to comment and have their comments considered. Rather, they are concerned because they did not participate in day-to-day development of the mitigation plan. While such involved participation may be desirable, its absence does not constitute a breach of coordination requirements of the MOA or of the Fish and Wildlife Coordination Act. There appears to be no disagreement that the FWS views must receive full and fair consideration, but in the final analysis, the official responsible for the final decision must stand by that decision independently. It is, therefore, not surprising that cases arise where the entirety of anyone's findings, including those of the Service on mitigation, are not always adopted. It should be noted that most of the Service's views were adopted.

4. DOI Concern - DE failed to justify in the SOF the reasoning for dismissing the Service's recommendations.

ASA(CW) addressed this at length in the October 18, 1984, letter. Essentially, DOI apparently believes an SOF must contain a thorough justification of the DE's views on all issues raised. Federal regulations

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describe an SOF as a document that "...shall include the DE's views on the probable effect of the proposed work on the public interest...". 33 CFR 325.2(a)(b). It requires nothing further than that and has been generally implemented in practice as a brief document summarizing the major issues. Only occasionally is it a detailed "justification" document.

5. DOI Concern - Inadequate environmental documentation.

DOI implies that the FWCA bestows some authority to pass judgment on Corps of Engineers documentation. ASA(CW) is unaware of any such authority and so stated in the October 18, 1984 letter. Perhaps a generic discussion of documentation requirements would help. The decision of whether to issue a permit is based on the entire administrative record, including all comments received. Three specific documents are required; an environmental document (either an assessment with a finding of no significant impact or an environmental impact statement), a 404(b)(1) analysis (if applicable), and an SOF. Specific Federal regulations govern the preparation of each and clearly designate the decision-making official as being responsible for the adequacy of that documentation. Federal agencies with special expertise have responsibilities to provide information in those areas of expertise. That information is included in the administrative record and just as surely affects the decision as if it were repeated verbatim in an assessment or SOF. If each agency were to review Corps documents as to adequacy, the duplication of effort and delay would be great indeed, but would not enhance the decision itself.

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Paragraph 7b(2) of the MOA requires the DE to provide a brief summary of how DOI comments were considered. We would be pleased to discuss a clarification of this provision so that DOI has sufficient information to judge whether its concerns were properly understood by the DE.

6. DOI Concern - Conditional approval for a future action.

Conditional approval of future actions is not an unreasonable course of action for several reasons. First, when future actions are reasonably related to current actions, some consideration of that future action is required in the decision process. Second, just because that consideration deals with future events, it does not preclude reconsideration as circumstances change in the future. But action on it now does prevent unnecessary repetition of procedures in the future. Corps regulations have specific provisions for reconsideration of decisions should circumstances change. Third, the concept of "conditional approval" is the same as that of general permits. Certain future events may occur without further case-by-case review as long as certain conditions are met which address public interest concerns.

7. DOI Concern - Rejection, without factual documentation of some of the Service's recommendations for mitigation.

As noted in discussion of point 5 above, we would be pleased to discuss appropriate information exchange requirements. In this instance, the project was modified significantly in response to FWS concerns, but not all FWS recommendations were adopted. How much additional discussion or justification would satisfy FWS informational needs is not clear, but it is certainly an appropriate subject for discussion pursuant to Section 7b(2) of the MOA.

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Summary of 1982 MVA Elevation Impacts **

Project Name	Elevation Criteria Raised by Service	Army Response	Resources Affected
Mississippi River-229 (LMMCD-GP 1522-13) Shelby County, TN	Policy review (cumulative impacts)	Elevation request denied since similar permit already under review.	178 acres bottomland hardwood forest (BLH) wetlands converted to cropland
J. Ray McDermott (LMMCD-SP 42) Assumption Parish, LA	Policy review (offsite mitigation)	Elevation request denied based on rationalized prediction that future wetlands losses in vicinity of project will be minimal.	245 acres BLH wetlands (Cypress-tupelo) converted to to industrial uses.
Mississippi River-233 (LMMCD-GP-1522-13) Shelby County, TN	Policy review (cumulative impacts) Insufficient coordination (agency positions misconstrued in EA)	Elevation request denied due to Army's summary rejection of data provided by Interior re. cumulative impacts.	120 acres BLH wetlands converted to cropland.
Timber Properties, Inc. (10647-01-167-J2) Morris County, NJ	Policy review (practicable alternatives, cumulative impacts, especially to Great Swamp NWR)	Elevation request denied; cumulative impacts issue dismissed, policy issues raised by Service termed technical disagreements by AS/CW.	8 acres palustrine forested wetlands and 14 acres of associated uplands converted to residential use.
National Marine Service (P-1429) Chautauqua, IL	Policy review (practicable alternatives)	Elevation request denied and data provided by Service refuted out of hand based on rationalized conclusions, issues of alternative sites also rejected but no data provided by Army or applicant.	Large, commercially important mussel bed, significant catfish wintering habitat and water-dependent recreation area converted to a barge floating facility.
*J.D. Alexander (LMMOD 122-14-3125-4) Catahoula Parish, LA	Policy review (Inadequate adherence to 404 (b)(1) guidelines, inconsistencies with statutory and regulatory mandates, cumulative impacts)	Elevation request approved, cumulative impact issue addressed but only as a means of forestalling elevation of additional permits involving BLH conversions.	325 acres forested wetlands converted to cropland.

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Summary of 1987 MOA Elevation Impacts

Project Name	Elevation Criteria Raised by Service	Army Response	Resources Affected
#*St. Mary's River (NABOF-F/R 80-2709) St. Mary's County, MD	Inadequate Coordination (Inadequate data provided by CE) Policy review (Inadequate mitigation)	Elevation request approved based on mitigation issue and lack of coordination with NPS.	170 acres palustrine wetlands, 120 acres riparian habitat potentially inundated; significant reduction in productivity of anadromous fishery and important free-flowing stream listed in NPS National Inventory.
*Tensas Delta Land Co. (LMKOD-FE 1522-14-14-25-7) Catahoula Parish, LA	Policy review (Cumulative impacts, failure to apply 404 (b)(1) guidelines properly)	Elevation request denied, Service data re. ELH habitat losses and resulting effects on water quality refuted, cumulative impacts issue dismissed as irrelevant.	2,600 acres forested wetlands converted to cropland.
*Patten, Boyte, and Evans (LMKOD-FE-1522-14-6425-8, 9, 10 Catahoula Parish, LA	Policy review (Inconsistencies with national policies, cumulative impacts)	Elevation request approved, not due to criteria raised, but because AS/CW discerned gaps in Service elevation package that DE had not presented, new information rejected at Division level, decision returned to DE.	1,110 acres ELH converted to cropland.
State of Maine (general permit)	Policy review (Inconsistencies with statutory and regulatory guidance)	Elevation request approved only to resolve compatibility of permit with Task Force on Regulatory Reform; permit issued without changes.	Essentially all important water and wetland dependent fish and wildlife resources potentially affected in Maine.
City of Homer (87-SYU-2-810655) Homer, Alaska	Insufficient coordination (permit issued without Service notification) Policy review (mitigation features deleted from permit)	Elevation request denied, permit had already been issued without conditions pertinent to mitigation; no, BII provided to habitat Service	66 acres intertidal and shallow subtidal habitat filled for port development, important for mussels and other benthic invertebrates, migratory salmonids, and migrating waterfowl severely degraded. Human recreation negatively impacted.

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Summary of 1982 MOA Elevation Impacts

Project Name	Elevation Criteria Raised by Service	Army Response	Resources Affected
Carolina Refining and Distributing Co. (78-SA-318) Georgetown County, SC	Policy review (Inadequate EA in lieu of EIS; lack of scoping and practicable alternatives) Insufficient coordination (no scoping, EA did not address alternatives)	Elevation request approved; case assigned to Division level for review; no policy decision provided; Army considered Services' points "largely technical".	Extensive estuarine resources, including 60,000 acres plus devoted to conservation scientific purposes threatened by probable chronic and acute petroleum pollution; 12 ARP's involved.
City of Chesapeake (NAODP-P-82-0873-15)	Insufficient coordination (EC ignored Service data) Significant new information (City revealed use of outdated hydrologic model; plans to facilitate floodplain development) Policy review (practicable alternatives)	Elevation request denied; AS/CW cites Service concerns as beyond scope of its responsibility under 1982 MOA.	27 acres BLH directly lost to dredging and disposal; additional 2,000 acres BLH and palustrine wetlands indirectly affected by drainage.
State of Florida (general permit)	Insufficient Coordination (Service, NMFS, and FGFIC request for workshop ignored) Policy review (permit contents do not provide for interior trustee mandates)	Elevation request denied; Service concerns re. lack of provisions for interior trustee mandates refuted; insufficient coordination criterion not addressed.	Essentially all important water and wetland-dependent fish and wildlife resources potentially affected in Florida without provision for interior trustee mandates.
Broad River Coop. (83-SC-226) Cherokee County, SC	Insufficient coordination (EA does not adequately address impacts, practicable alternatives) Policy review (misapplication of RGL 82-5 to riparian doctrine states)	Elevation request approved; insufficient coordination concerns disputed by AS/CW, 1S/CW concurred in misapplication of RGL 82-5, directed DE to determine an adequate minimum discharge of water from project.	Mitigation Policy Resource Category 2 stream (shoal, riffle) supporting recreationally and commercially important fishery as well as endemic, rare fauna disrupted by project.

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Summary of 1982 MOA Elevation Impacts

Project Name	Elevation Criteria Relied by Service	Army Response	Resources Affected
Reeves, Maybank (81-50-220, 82-20-263) Georgetown and Charleston Counties, SC	Policy review (Disregard of FWCA recommendations on obvious resource based issue, cumulative impacts, precedence of activity)	Elevation request denied cumulative impact, precedence issues rejected, application of FWCA recommendations optional to ACE.	1,500 acres tidal salt and brackish marsh wetlands converted to impoundment for waterfowl hunting, incidental mariculture.
Mountain View Brady Mix (W-N-050-03-1850) Izard County, AR	Policy review (Project would degrade Congressionally authorized mitigation area for CE projects on White River, DE decision contrary to site-specific studies, indirect effects on Norfork NFH)	Elevation request approved; DE decision contrary to to scientific data not considered policy issue; no basis found for giving "more than normal weight to potential impacts on this facility . . ." (WIN).	4,100 feet gravel bar within White River trout fishery aimed for gravel, loss of food-producing substrate, trout productivity, indirect effects on Norfork NFH, a project authorized by Congress to mitigate effects of CE White River impoundments.
Searsport (NEDOD-A-03-72-558) Searsport, ME	Policy review (Cumulative impacts, inadequate EA issued, failure to address practicable alternatives lack of EIS inconsistent w/CEQ regulations and encumbered Service FWCA responsibilities)	Elevation request denied; Service concerns, issues termed "technical and and jurisdictional and not merit" of policy-level review.	16.1 acres intertidal/ shallow subtidal wetlands, 90 acres deep subtidal wetlands, 50+ acres upland forest important to migratory waterfowl, shorebirds, other migratory and resident species lost to project, far larger areas affected by potential future development induced by project.
Mouth River (NADOP-79-0121-DA, NADOP-80-0264-7A) Prince Edwards County, VA	Significant new information (Recent EPA study issued) Insufficient coordination (failure of CE to consult fully in development of mitigation plan) Policy review (DE did not incorporate data from previous EIS, cumulative impacts, practicable alternatives; conditional approval of permit w/o present or future project need shown)	Elevation request denied; EPA study considered by DE but given little weight since it conflicted with earlier data, insufficient coordination criterion rejected even though Service not involved in final mitigation plan except to provide comments which CE did not apply to final plan; failure of DE to consider all available data denied, decision for conditional approval supported, Service standing to question CE supporting data challenged.	548 acres wetlands inundated, 66 acres wetlands altered downstream of dam, total of 1021.5 acres of wildlife habitat inundated including habitat for three HSSE's (wood duck, mallard, black duck).

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Summary of 1982 MOA Elevation Impacts

RESOURCES LOST OR IMPACTED:

		acres dredged	acres cleared	acres filled	acres inundated	acres impacted indirectly
6,931	acres forested wetlands	27	4,776*	8	178	2,000
170	acres additional palustrine wetlands	-	-	-	170	-
61,684	acres estuarine wetlands	-	-	184	1,500	60,000
618	acres other wetlands	-	-	-	140	69
TOTAL 69,403	acres	27	4,776	192	2,338	62,069

4.5 miles in four specific reaches of commercially, recreationally, or environmentally important streams directly impacted.

113 miles indirectly impacted.***

In addition, essentially all important water and wetland-dependent fish and wildlife resources in the states of Maine and Florida have been or will be affected by general permits issued over the objections of the Department of Interior.

* Denotes elevated permit cases that eventually resulted in litigation.

** Table includes only elevation sought by Fish and Wildlife Service.

*** Indirect impacts include, but are not limited to probable chronic and acute petroleum pollution, altered water regimes, and projected future drainage.

404 (c) invoked by EPA

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

7 NOV 1984

Mr. Robert K. Dawson
Acting Assistant Secretary of the Army
(Civil Works)
Department of the Army
Washington, D.C. 20310

Dear Bob:

For nearly two and a half years, our Departments have been involved in an exchange of views relative to the Department of the Army's (Army) implementation of our interdepartmental Memorandum of Agreement (MOA). It is now abundantly clear that further correspondence on this issue is pointless and that Army's regulatory program is so flawed, it is no longer a useable tool to adequately protect wetlands.

In response to your August 30, 1984, letter, the proposals I have made relating to modifying the MOA are necessary; are supported by the accompanying data; do not extend the existing permit review timeframe, and are consistent with the Vice President's regulatory relief program. Unfortunately, they were rejected by your Office. As of this writing, Army's refusal to incorporate Fish and Wildlife Service (Service) proposals in those permits I requested be elevated has resulted in a direct loss or degradation of over 69,000 acres of wetlands. That total could have been avoided or significantly reduced had Army followed the Service's recommendations.

Furthermore, of the 23 permits for which elevation was requested but rejected by Army, four have resulted in lawsuits and four have resulted in Section 404(c) actions based on environmental grounds. This hardly results in a streamlined, timely, or predictable regulatory program, and these were primary goals of the Vice President's regulatory relief efforts. Such actions also serve to place the Administration in a needlessly negative light regarding environmental matters. As long as our Departments continue to "battle it out," this perception will continue.

It will not serve your purpose or mine to continue an eternal colloquy that only precludes issue resolution. It is imperative in the national interest that we meet to discuss revisions of the existing MOA to incorporate:

A resource based elevation criterion. Protecting our national natural heritage is a matter of national significance that cannot continue to be ignored.

Require decision review (elevation) at the request of the Assistant Secretary for Fish and Wildlife and Parks.

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- After the Notice of Intent to Issue, reinstate negotiations between the Field Supervisor/District Engineer and/or between the Regional Director/Division Engineer without extending the overall timeframe.

- Delete "threat" language requirement from the Service's Fish and Wildlife Coordination Act Report.

- Provide for termination and renegotiation of the MOA, by either party, with a 30-day notice.

In addition, we find Army's policy that mitigation is not required "over and above that offered by an applicant," as expressed in your October 30, 1984, letter, to be unacceptable. We must establish a mitigation/resource loss prevention strategy that is in conformance with the requirements of the Fish and Wildlife Coordination Act, NEPA and Corps' regulations. This strategy must define in specific terms the "equal consideration" requirement and its relationship to the regulatory program. It must make concrete what is now a vague concept.

Supporting documentation is enclosed.

Sincerely

Ray

G. Ray Arnett
Assistant Secretary for Fish and Wildlife and Parks

Enclosures

Bob: This is a situation we should surely try to resolve ASAP. Like you, I, too, dislike having our differences aired in the press. Please know that I want to cooperate to the maximum extent possible.

Warm Thanks R

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United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

DEC 17 1984

Mr. Robert K. Dawson
Acting Assistant Secretary of the Army
(Civil Works)
Department of the Army
Washington, D.C. 20310

Dear Bob:

I have reviewed your response of October 18, 1984, to my request for elevation of the decision of the District Engineer, Norfolk District, to issue permits for two dams in the Bush River Watershed, Virginia. Your letter essentially "brushes off" the concerns that I believe were carefully documented in my letter, and this is symptomatic of the lack of agreement we have regarding the procedures outlined in the 1982 interdepartmental Memorandum of Agreement.

I disagree with your findings concerning all of the major points that were addressed in my letter of October 2, 1984. Regarding the information that was presented by the Environmental Protection Agency (EPA), it is incredulous that the District Engineer would dismiss a scientific report fully supported by an agency with expertise in the area of wetlands determination. Although the Fish and Wildlife Service (Service) did participate with the Soil Conservation Service (SCS) in an effort to inventory wetlands at the project sites, the inventories were conducted in 1980. The new inventory sponsored by EPA was conducted in 1983 and was much more detailed than the Service/SCS inventory. The District Engineer did not present an analysis of the EPA report that refutes its findings, and to our knowledge, the District Engineer did not ask if the Service agrees with EPA's findings. In fact, the Service fully supports the EPA report. Do you believe the District Engineer adequately considered the new information provided by EPA?

Regarding the issue of insufficient coordination, your response appears to contravene the intent of the Fish and Wildlife Coordination Act (FWCA). The intent of the FWCA is to provide that wildlife conservation receive equal consideration with other features of water-resource development programs. The FWCA clearly designates the Service as an agency with special expertise in the field of mitigation of project impacts to fish and wildlife resources. As you admitted, the District Engineer failed to fully coordinate with the Service and to accept the entirety of the Service's findings on mitigation. Furthermore, the District Engineer failed to justify in the Statement of Findings (SOF) the reasoning for dismissing the Service's recommendation. How can you support the District Engineer's actions in light of the requirements of the FWCA?

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The first policy issue that I raised was that of inadequate environmental documentation of the District Engineer's decision. It appears that you misunderstood this issue to mean decision documentation, addressed in my letter as the third policy matter. I maintain that the District Engineer's documentation of the fish and wildlife issues involved in the Bush River Watershed projects falls far short of the statutory and regulatory requirements mentioned in my October 2 letter. Your assertion that environmental documentation is not an area of expertise of the Service astounds me, and I refer you, again, to the FWCA. The Service has responsibility, by statute, in the area of determining environmental impacts of water-resource development projects. Although the Corps is guided, as are all agencies, in this issue by statutes and regulations, policy directives in the form of Regulatory Guidance Letters can direct the implementation of environmental documentation. From experiences with other permits such as Georgetown Refinery in South Carolina and Searsport in Maine, I feel that the Corps staff would benefit from new policy guidance in this area.

The second policy issue that I raised involves conditional approval of a future decision to allow water to fill the Site 12 reservoir. I asserted that the responsibilities of the District Engineer to evaluate the public interest balancing factors and of the Service to evaluate impacts of the project to fish and wildlife resources were being circumvented by the decision to provide for such a conditional approval. You stated that the potential for filling the dam was reflected in great detail throughout the record. I agree that the possibility of filling the reservoir was discussed at some length in the District Engineer's findings. However, the point that I was making, and that you failed to address, is that the conditional approval did not and cannot take into account the balancing factors related to project and natural resource conditions that may exist at the future date when the approval may be given. Environmental conditions change with time, and it is difficult to predict what impacts, either positive or negative, may occur due to filling the reservoir some four to ten years from now. We have no indication that the District Engineer made any attempt to project the future circumstances and analyze the potential impacts that might occur. This is not a question of the District Engineer's authority to condition a permit, Bob. The question is whether it should be a Corps policy to permit approval of a future action when the circumstances surrounding that action are presently unknown.

The third policy issue I addressed concerns the District Engineer's decision to reject, without factual documentation, some of the Service's recommendations for mitigation. Your assertion that the SOF is simply a summary of the decisionmaker's views on the issues is misleading, at best, and contravenes the spirit of cooperation between our two Departments regarding permit decisions. As you well know, the SOF is one of only three documents the Service normally receives from the Corps supporting its decision on a permit application. The other two documents received by the Service are, in this case, a Notice of Intent to Issue the permit, and an Environmental Assessment with its Finding of No Significant Impact. I hope you would agree that the factual basis supporting the District Engineer's decision should be stated concisely

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within those three documents. Otherwise, the Service and other interested parties would have to request from the Corps the entire documentation included in the Administrative Record in order to understand the basis for the Corps' decision. Don't you agree that this procedure would be cumbersome, time consuming, and contrary to the spirit of the regulatory reform effort?

In this particular case, Bob, I found nowhere in the supporting documentation the factual basis for the District Engineer's decision to reject some of the Service's advice on potential impacts to fish and wildlife resources and recommendations for mitigation measures. The District Engineer's findings contrary to Service advice are subjective in nature. I see this issue as a policy matter because implementation of Corps regulations on this topic is guided by policy statements such as the Regulatory Guidance Letter 84-9. Furthermore, I cannot believe that you would condone sloppy decisionmaking or the "short-changing" of commenting agencies by allowing such pitiful examples of decision documentation to see the light of day. This issue is of concern to me because I believe that your response could undermine the significance of the SOF and the cooperation that has developed between our two Departments.

Bob, I would like to find a way to resolve our wide divergence of opinions. Will you kindly review this letter and my letter of October 2, and provide a response that is "on target"?

Sincerely,

G. Ray Arnett
Assistant Secretary for Fish
and Wildlife and Parks

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Senator CHAFEE. In the letter, Mr. Arnett said he cannot get anywhere with Mr. Dawson. I will submit the full letter for the record, but this is what Mr. Arnett said: "The nominee's regulatory program is so flawed it is no longer a usable tool to adequately protect wetlands," and pleading with Mr. Dawson to revise the memorandum of understanding which the Fish and Wildlife people had signed, and, made some grievous errors in it and were trying to straighten it out, and weren't getting to first base.

That is one of the factors that brought on the extensive oversight hearings with Mr. Dawson. If I might say, Mr. Chairman, everyone pays service, and all too often lip service to the need to preserve the Nation's wetlands. This is an absolute top priority.

But, when it gets right down to the actual wetlands, where the competition is coming from some development, all too often the wetlands is the loser, and that is the problem here. The Corps of Engineers has an extensive say in whether they can proceed, they being the developers.

It is our complaint that the Corps of Engineers, under the direction of Mr. Dawson, is not giving adequate consideration to these environmental factors.

Senator WARNER. For purposes of clarifying the status of this matter for others who have got to work on it, I understand that if an agreement can be worked out, a written document between the three agencies, and providing a certain measure of satisfaction to this committee that the matter can be resolved——

Senator CHAFEE. Yes, Mr. Chairman. I thoroughly recognize that Mr. Dawson is a Presidential appointee, and that the President has a right within certain limitations—after all, there is Senate confirmation—to his appointments, that at least is my philosophy, and since I have been in the Senate, I suspect I have only voted against one Presidential appointment in 10 years.

I do not do this casually and we are trying to work out a memorandum of understanding, on which they are making progress, between Fish and Wildlife, EPA, and the Corps on these matters, and Mr. Dawson has been applying a lot of energy to achieve that.

Senator WARNER. Do we have a timetable for the resolution of that?

Senator CHAFEE. Well, the earlier the better, as far as I am concerned. That is why we have had these hearings. We started these hearings in May and we have given them time. We have not been able to resolve it, and they come back again.

My feeling, Mr. Chairman, is that unless somebody pays attention on the Environment and Public Works Committee to this whole matter, it will just drift along. As I mentioned to you earlier, we had a hearing just before the recess and Mr. Dawson was anxious to proceed with it, so we returned from the recess on Monday and we had him scheduled for Tuesday afternoon.

Senator WARNER. I understand that. That is clear in the record.

Well, we will recess this hearing with the understanding that no action will be taken by this committee until such time as the chairman of your committee and the chairman of this committee, Mr. Goldwater, have determined what is the direction we should take, and at what point we should take that step.

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Senator CHAFEE. Thank you, Mr. Chairman, and I can commit to you and to your committee that we are not out to delay this at all. Pardon me, I am being corrected. It appears that Mr. Dawson could come to the Tuesday hearing but the Department of Interior person who was scheduled could not be here.

Senator WARNER. Mr. Dawson, do you have any further comments you wish to make here, again having observed the colloquy between Senator Chafee and myself?

Mr. DAWSON. Mr. Chairman, thank you very much.

I will thank the committee again. Of course, I am deeply disappointed at the additional delay. There are many other issues involved in my job. One is to attempt to get an Omnibus Water Resources Development bill that requires a great deal of time and requires the credential that this committee hopefully will bestow upon me.

Again, I respect very deeply Senator Chafee's concerns here. I have spent countless hours in the last 6 months addressing this issue, for one reason, because of Senator Chafee and Senator Stafford and others' very strong concerns here.

I am pleased that at no time in this hearing has any issue been raised about my qualifications to do the job, and I would hope that would be paramount in the minds of the committee. A couple of substantive points. I am pleased that the record of Senator Chafee's hearings will be made a part of the record because I think those are instructive.

I think the men and women of the Corps of Engineers that are wrestling with the very difficult job of balancing these competing interests deserve recognition, not criticism. I think they are doing a good job. I think the stewardship of the program has been good. Obviously, we need to do a better job of providing assurance to those with very deep concerns that we are factoring in all of these areas.

I might point out, as you had mentioned, Secretary Arnett's letter will be made a part of the record. We have a very detailed response to that letter that I might ask also be——

Senator WARNER. Without objection, that will also be made part of the record following Secretary Arnett's letter submitted by Senator Chafee.

Mr. DAWSON. The wetlands issue, in closing, is one that concerns everyone and concerns the Army, not just to the extent of lip service. I think it is important for the committee to know that under the Office of Technology Assessment study, 85 to 90 percent of the wetlands lost each year have nothing to do with the Army's regulatory program.

That is not to suggest that the Army's program is not important, and that wetland losses must be considered, but we have got a very serious problem here that transcends the Army's program. Since regulatory reform we are actually denying statistically more permits. It is not a great number more, but we are denying more than we were before.

So, I think there is a balance there. We obviously have more to do, more work to do. I would only hope that we could proceed apace for many obvious reasons.

[Questions for the hearing record with answers supplied follow:]

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QUESTIONS SUBMITTED BY SENATOR JOHN WARNER

Senator WARNER. What is the Corps doing to assist in the clean-up of the Chesapeake Bay?

Mr. DAWSON. The Corps has given, and continues to give, assistance in a number of ways:

(1) Membership on Chesapeake Bay Implementation Committee and Research and Modeling Subcommittee (these are under the aegis of the Chesapeake Executive Council);

(2) Conducting the Chesapeake Bay Shoreline Erosion Study (reconnaissance phase) to be completed in March 1986. Study will identify eroding areas and develop and compare low-cost solutions to treating those areas to reduce erosion. The study could lead to a subsequent 2½-year feasibility study, to be cost shared on a 50–50 Federal/non-Federal basis;

(3) Completing an extensive multimillion dollar industrial and domestic waste treatment program on Army military installations within the Chesapeake Bay Basin. Since fiscal year 1968, Army has spent over $60 million for the improvement of industrial and domestic waste treatment facilities in the Bay region.

(4) The Corps' Section 404 permit program helps protect the quality of the Bay by regulating discharges of dredged and fill material;

(5) On November 21, 1984, Corps signed a Memorandum of Agreement with Environmental Protection Agency delineating the contributions the Corps has agreed to make in the Chesapeake Bay program;

(6) In order to obtain additional expertise, the Corps is in the process of appointing Mr. T. A. Williams of Reedville, Virginia, to the position of "Special Advisor to the Assistant Secretary of the Army (Civil Works) for Chesapeake Bay;" and,

(7) The Corps is sponsoring a 1½ day "Chesapeake Bay Forum" on October 30–31, 1985, at the National Defense University, Fort McNair. This forum will bring together 150–200 leading government, environmental, academic, and private-sector decisionmakers concerned with solving problems in and around the Bay. It will focus on Bay-related activities of the Department of the Army and the relationship of the activities of others with those of the Army (Senator Warner is an invited speaker, along with Senators Mathias and Specter).

Senator WARNER. What is the status of Corps negotiations on cost sharing with major deep-draft ports? With which ports have you signed agreements?

Mr. DAWSON. We are in various stages of negotiations depending upon the planning status of the project and depending upon whether the project had been included in the President's fiscal year 1986 budget. Obviously, those projects which have planning complete or were included in the President's budget are farther along than those which were not. Of the five major ports, only Baltimore negotiations began before the fiscal year 1985 supplemental was passed. A few months ago, it was only one authorized. Others are just beginning.

Senator WARNER. Who is authorized to negotiate the cost sharing agreements on behalf of the Corps?

Mr. DAWSON. In general, cost sharing negotiations are being handled by the local District Engineer. This has been the practice in the case of the fiscal year 1986 budget formulation. However, in certain cases where there are special problems or situations, there have been direct negotiations with the Office of the Assistant Secretary of the Army for Civil Works, with full participation by the District Engineer. Among these situations are the Barnegat Inlet and Baltimore Harbor projects.

In the case of Baltimore, there is a complex problem involving the credit for the items of local cooperation which the State of Maryland had provided in anticipation of the project. Our practice is that whenever a District Engineer identifies a special problem, the Secretary's office responds as appropriate to the problem and this may include entering into direct dialogue with the project sponsor.

Senator WARNER. What is the timeframe for the conclusion of negotiations?

Mr. DAWSON. There are no deadlines. Negotiation of new starts is an ongoing process. There are important milestones, however. To be budgeted as a fiscal year 1987 new start, a Letter of Intent would have to be submitted in time for us to make final recommendations to OMB by November 4, 1985. For projects funded as new starts in the fiscal year 1985 Supplemental, the fiscal year 1985 funds cease to be available on June 30, 1986, if a contract and financing plan have not been agreed to with the project sponsor.

Senator WARNER. Have you agreed to full Federal funding of the Brewerton Channel leading to the Port of Baltimore? What is the rationale for this decision? What is the estimated cost of this improvement?

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Mr. DAWSON. We have indicated to the Maryland Port Administration that, under the terms of S. 1567, the cost sharing for Brewerton Channel would be under the terms of the original existing project as Brewerton Channel is an unconstructed element of the existing project and such elements are grandfathered under S. 1567. I should add, however, that there has been no commitment to construct the Brewerton Channel and no commitment will be made until we have reviewed the benefit cost analysis for the project element and also reviewed the cost estimate for the work. At this time, the cost estimate is not completed because studies are not completed.

Senator WARNER. How can ports fund their share as specified in cost sharing agreements without specific authorization to charge user fees?

Mr. DAWSON. We envision such authority being given in any new authorizing legislation. Any negotiation would be based on anticipation of ports receiving such authority, as we consider the right to impose user fees to be an integral part of the non-Federal cost sharing requirement.

Senator WARNER. How will the $40 million available from the Supplemental Appropriations bill be allocated to the 40 projects included in the legislation?

Mr. DAWSON. The funds will be allocated in accordance with the level of funding necessary and appropriate for each project, given its stage of development. I should point out that among the 41 projects there are included projects for which there has been little or no Corps planning; in other cases, there has been no post authorization planning. Obviously, the capacity to spend money on these projects is much less than it is on projects on which construction can be initiated in fiscal year 1986. Included among these projects would be those which were budgeted in fiscal year 1986 and earlier years.

Senator WARNER. Since ports are full financing partners in construction projects, will they be allowed to share project management responsibility?

Mr. DAWSON. We expect that the non-Federal partner will have a major say in the scaling, scope, and staging of any project development, plus the auditing of expenditures. However, the Corps discretion to allow joint management of contracts would have to be in accord with existing Federal procurement regulations.

SUBMITTED BY SENATOR CARL LEVIN

Senator. LEVIN. I understand you have been unwilling to enter into an arrangement with the EPA relative to the definition of wetlands and the definition of land fill. What is the status of your negotiations with the EPA and the interior Department?

Mr. DAWSON. There has been no unwillingness on Army's part to enter into a joint EPA/Army definition of fill material. From 1977 to 1980, EPA and the Army agreed on the present Army definition. In 1980, EPA unilaterally changed its definition. Ms. Josephine Cooper of EPA and I entered a joint declaration to gather information and establish a joint definition of fill in early September 1985, we exchanged reports, and we are on target to have a join. definition by the end of 1985. The Department of Interior is not involved in the definition of fill.

Regarding the definition of wetlands, I believe your reference is to the landward jurisdictional limit of Section 404 of the Clean Water Act. The Army's definition of wetlands, which is identical to EPA's definition, has remained the same since 1977 as follows: "The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in staturated soil conditions. Wetlands generally incude swamps, marshes, bogs and similar areas." I indicated at the hearing of the Environmental Pollution Subcommittee of the Environment and Public Works Committee relative to Section 404, the Corps subscribes to EPA's definition of the interstate commerce nexus for isolated wetlands. That definition is consistent with the Corps regulations and has been circulated to our districts.

Senator LEVIN. Has the White House been involved in these negotiations?

Mr. DAWSON. The Office of Management and Budget has facilitated the schedule for developing a joint definition of fill material indicated in the previous answer.

Senator LEVIN. Has the White House expressed a view between your position and that of the EPA and the Interior Department? If so, what is that view?

Mr. DAWSON. The Office of Management and Budget's role on the definition of fill has been to encourage resolution, not to express a view on what the outcome should be.

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Senator LEVIN. What portion or portions of the regulatory changes proposed on May 12, 1983, do you intend to publish in final form? When do you expect to publish them? When will they be available to Members of Congress?

Mr. DAWSON. No final determination on the final form of the regulations has been made. However, the regulations will basically follow the present 1982 regulations as amended on October 5, 1984, pursuant to the settlement agreement of the *National Wildlife Federation* vs. *Marsh* lawsuit.

Senator LEVIN. Do you believe that it is appropriate for the Corps of Engineers to determine when specific wetlands affect interstate commerce? If so, on what basis and by what standards?

Mr. DAWSON. EPA, of course, has the final call on such matters. However, under a Memorandum of Understanding (expired but still being followed by the Corps and EPA until a new agreement is finalized), the Corps makes jurisdictional calls in the field. Such determinations are made consistent with the joint Army/EPA definition of "waters of the United States."

Senator LEVIN. In a letter dated November 7, 1984, to you from G. Ray Arnett, Assistant Secretary of Interior for Fish and Wildlife and Parks, five revisions were proposed in the Memorandum of Agreement between your agencies, as follows:

A resource based elevation criterion.

Require decision review (elevation) at the request of the Assistant Secretary for Fish and Wildlife and Parks.

After the Notice of Intent to Issue, reinstate negotiations between the field Supervisor/District Engineer and/or between the Regional Director/Division Engineer without extending the overall timeframe.

Delete "threat" language requirement from the Service's Fish and Wildlife Coordination Act Report.

Provide for termination and renegotiation of the MOA, by either party, with a 30-day notice.

Please comment on each of these proposals and indicate what your counterproposal is in each instance.

Mr. DAWSON. a. We have basically agreed with the Department of Interior that some elevation requests for resource criteria are appropriate. We have suggested to DOI that such elevations could be made under a slight modification of the present criteria of insufficient interagency coordination.

b. This is what we call automatic elevation. We feel that the elimination of this has been one of the most effective reforms in making the program predictable and gaining public confidence. Therefore, we do not want to backtrack on this issue, but have offered three substantive alternatives to ensure DOI's views are given full consideration:

Informal consultation after the district engineer reaches a tentative decision.

Regularly scheduled meetings between the Regional Administrator (or Director) and the Division Engineer to monitor program implementation.

Mandatory review at headquarters level of any programmatic issues not resolved at the local level.

c. We have agreed with DOI on this issue

d. We have agreed with DOI on this issue

e. We have agreed with DOI on this issue

Senator LEVIN. Relative to the permits for two dams in the Bush River Water Shed in Virginia, do you believe the district engineer's decision should have been stated concisely within the following three documents: (1) Statement of Findings; (2) Notice of Intent to Issue the Permit: (3) Environmental Assessment?

Mr. DAWSON. Yes. The statement of findings should enunciate the decisionmakers analysis. The notice of intent to issue is a brief summary of the objecting resource agency's views and those of the district engineer, while the environmental assessment is a document to determine the need for an Environmental Impact Statement.

Senator LEVIN. Relative to that same case, should the factual basis for the district engineer's decision to ignore some of the Fish and Wildlife Service's advice on impacts to fish and wildlife resources and suggested mitigation measures have been specified in the supporting documentation?

Mr. DAWSON. As indicated in my answer to question No. 8 above, the district engineer is never authorized to ignore comments made by the DOI. However, there are situations in which the Corps cannot implement all mitagation recommended by DOI. In such cases, the decision documentation should provide the reasons that these recommendations were not implemented.

Senator LEVIN. How do you suggest the ongoing dispute between the corps of Engineers and the Department of the Interior on matters of mitigation be resolved?

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Mr. DAWSON. The mitigation policy of the Corps is embodied within our regulations and the 404(b)(1) guidelines. The DOI has requested further clarification of our policy. Discussions are currently ongoing. The Assistant Secretary for Fish and Wildlife and Parks, Bill Horn, and I are meeting regularly in an all-out effort to resolve any differences. Any proposed changes in regulations will, of course, require rulemaking.

Senator WARNER. If there are no further Senators desiring to be recognized, the Chair will recess these hearings. There may well be necessity to have further hearings on this matter before the committee is prepared to——

Senator NUNN. Mr. Chairman, just one question. Did you decide to delay action?

Senator WARNER. That is right. I have just put this hearing in recess until such time as the respective chairmen and ranking minority members of the two committees can give some further direction.

The committee stands in recess.

[Whereupon, at 10:35 a.m., the committee recessed subject to the call of the Chair.]

[The nomination of Robert B. Sims was reported to the Senate by Senator Goldwater on September 12, 1985, with the recommendation that the nomination be confirmed. The nomination was confirmed by the Senate on October 16, 1985.]

[The nomination of Robert K. Dawson was reported to the Senate by Senator Goldwater on September 30, 1985, with the recommendation that the nomination be confirmed. The nomination was confirmed by the Senate on December 4, 1985.]

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